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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-730

COMMONWEALTH OF PUERTO RICO AND
PUERTO RICO WATER RESOURCES AUTHORITY,
Petitioners

v.

COMMONWEALTH OIL REFINING COMPANY,
INC., ET AL,
Respondents

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

KENNETH R. WYNNE
2900 South Tower Pennzoil Place
Houston, Texas 77002

BENJAMIN RODRIGUEZ RAMON
Housing Investment Building
Suite 840
P. O. Box "SS"
Hato Rey, Puerto Rico 00919

Counsel for Petitioners

November 6, 1979

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioners, the Commonwealth of Puerto Rico and the Puerto Rico Water Resources Authority, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 13, 1979.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at 596 F.2d 1239 (June 13, 1979) and under

No. 78-3019, slip op. at 5460 (5th Cir. June 13, 1979). The opinion of the District Court for the Western District of Texas, San Antonio Division, is not reported. The opinion of the Bankruptcy Court, District Court for the Western District of Texas, San Antonio Division, is reported at 4 Bankr. Ct. Dec. 589 (May 26, 1978). Copies of all of these opinions appear in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 13, 1979, a timely Petition for Rehearing En Banc was denied on August 9, 1979, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 11 U.S.C. § 47(c) and 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. What is a corporation's "principal place of business" for purposes of venue under Bankruptcy Rule 116(a)(2)?

2. To what extent are the interests of creditors and non-debtor parties to be considered in establishing venue in a Chapter XI brankruptcy proceeding?

STATUTORY PROVISIONS INVOLVED

1. Bankruptcy Act, § 2(a)(1) [11 U.S.C. § 11(a)(1)]:

   a. The Courts of the United States herein before defined as courts of bankruptcy are hereby created courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this Act, in vacation, in chambers, and during their respective terms, as they are now or may be hereafter held, to —

   (1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction, or who do not have their principal place of business, reside, or have their domicile within the United States, but have property within their jurisdiction, or in any cases transferred to them pursuant to this Act;

2. Bankruptcy Act, § 32(b)-(c) [11 U.S.C. § 55(b)-(c)]:

   b. Where venue in any case filed under this Act is laid in the wrong court of bankruptcy, the judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought.

   c. The judge may transfer any case under this Act to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his principal place of business, or his residence, if the interests of the parties will be best served by such transfer.

3. Bankruptcy Rule 116(a)(2), (b):

   (a) Proper Venue.

   (2) *Corporation or Partnership.* A petition by or against a corporation or partnership may be filed in the district (A) where the bankrupt has had its

principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or, (B) if there is no such district, in any district where the bankrupt has property.

(b) Transfer of Cases; Dismissal or Retention When Venue Improper.

(1) *When Venue Proper.* Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.

(2) *When Venue Improper.* If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

STATEMENT OF THE CASE

This is a venue dispute in one of the largest bankruptcy actions ever filed in the United States—the Chapter XI arrangement proceedings of Commonwealth Oil Refining Company and various of its subsidiaries ("Corco"). Corco

is a massive refining and petrochemical company located in the Commonwealth of Puerto Rico and is that island's largest private enterprise. In controversy is whether Corco's Chapter XI arrangement proceedings should be conducted in San Antonio, Texas or in Puerto Rico.

Corco was incorporated in 1953 under the laws of the Commonwealth of Puerto Rico and has developed and maintained all of its physical operations in Puerto Rico ever since that date. It is the cornerstone of "Operation Bootstrap," the industrialization program of Puerto Rico fostered by the governments of both Puerto Rico and the United States. All of Corco's production, all of its physical assets (with an estimated replacement value of over $1,000,000,000.00), over 95% of its employees and the vast majority of its sales are in Puerto Rico. In 1976, after Tesoro Petroleum Corporation had successfully tendered for a controlling interest in Corco, Tesoro moved Corco's executive offices to San Antonio where Tesoro was headquartered, to facilitate a planned merger between the two companies. The merger plan was soon dropped, but Corco's executive offices and some 70 Corco employees have anachronistically remained in San Antonio. Corco conducts no business in San Antonio.

Corco commenced these proceedings in San Antonio on March 2 and 3, 1978. On March 6, 1978, the Commonwealth of Puerto Rico ("the Commonwealth") and the Puerto Rico Water Resources Authority ("PRWRA"), Puerto Rico's only utility, which is dependent upon Corco for fuel oil, objected to venue of these proceedings in San Antonio and moved to transfer them to the United States District Court for the District of Puerto Rico. Following a four day evidentiary hearing in May, 1978,

the Bankruptcy Court for the Western District of Texas, sitting in San Antonio, filed a Memorandum Opinion holding that venue was proper in San Antonio and should be retained there. The Commonwealth and PRWRA promptly appealed. On August 25, 1978, the District Court found that venue was not proper in San Antonio but nevertheless affirmed the Bankruptcy Court's decision retaining venue in San Antonio. The Court of Appeals for the Fifth Circuit reversed the District Court's finding that venue was improper in San Antonio and affirmed retention of venue in San Antonio.

REASONS FOR GRANTING THE WRIT

1. BY PREDICATING VENUE EXCLUSIVELY ON THE LOCATION OF THE DEBTOR'S EXECUTIVE OFFICES, THE DECISION BELOW UNDERMINES THE BASIC AIM OF CHAPTER XI TO RECONCILE DEBTOR AND CREDITOR INTERESTS.

The Fifth Circuit found venue to be proper in San Antonio primarily because it decided that San Antonio was Corco's "principal place of business" pursuant to Bankruptcy Rule 16(a)(2).[1] The Fifth Circuit justified its ruling by pointing to the presence of Corco's executive offices in San Antonio and assuming therefrom that it would be "less disruptive" to Corco's financial rehabilitation to maintain venue in San Antonio. In so doing, the Court contorted the concept of "principal place of business," locating it in a city where Corco's senior financial officer testified the debtor does no business at all.[2] Linking its approval of venue in San Antonio to its unique notion of "principal place of business," the Fifth Circuit virtually ignored the great majority of Corco's creditors and parties in interest, in particular the Commonwealth and the Official Creditors Committee, who requested a transfer and whose interests would be served by a transfer of this case to Puerto Rico.

1. Rule 116(a)(2) implements Bankruptcy Act, § 2(a)(1) [11 U.S.C. § 11(a)(1)].

The hallmark of bankruptcy jurisdiction has always been the protection of the rights and interests of creditors, as well as the rehabilitation of a debtor. *Williams v. United States Fidelity & Guaranty Co.*, 236 U.S. 549 (1915); *Burlingham v. Crouse*, 228 U.S. 459 (1913). *See also Kokoszka v. Belford*, 417 U.S. 642 (1974); *Straton v. New*, 283 U.S. 318 (1931); *Remington, A Treatise on the Bankruptcy Law of the United States* § 17 at 34-38 (1950). Protecting and serving the entire community of interests swept into a bankruptcy proceeding, without undue coddling of the debtor, are essential premises of the Bankruptcy Act. *Bank of Elberton v. Swift*, 268 F. 305, 308 (5th Cir. 1920); *Remington, supra*, § 17 at 37. A Chapter XI proceeding is not to rehabilitate a debtor by "unduly prejudicing the rights of any interested parties." *In re Transvision, Inc.*, 217 F.2d 243, 246 (2d Cir. 1954), *cert. denied*, 348 U.S. 952 (1955). Bankruptcy Rule 116(b)(1) relates venue to the "interest of justice and the convenience of *the parties*," not of the debtor alone.

Departing dramatically from these fundamental precepts the Fifth Circuit has derogated the rights and in-

2. "Q: Mr. Wetzel, is Corco engaged in business in San Antonio? A: No, not to my knowledge. . . . Commonwealth Oil Refining Company does not do business in San Antonio." (Tr. 321)

terests of the creditors and other non-debtor parties for the sake of a presumed convenience to the debtor, Corco.[3] Entirely overlooked in the Court's preoccupation with the benefits it presumed will inure to Corco through venue in San Antonio are the parties who have urged that venue be transferred: the Government of Puerto Rico, the Securities and Exchange Commission of the United States, the Department of Energy of the United States, the Government Development Bank for Puerto Rico, all of Corco's bank creditors in Puerto Rico, PPG Industries (the creditor with the largest claim in these proceedings), Transocean Gulf Oil Company (Corco's largest trade creditor), Corco's employees' union and, most significantly, the Official Creditors Committee (charged with the fiduciary obligation to represent all Corco's unsecured creditors). These parties represent a myriad of critical interests and, as each has consistently maintained, those interests would

3. The Court's presumption, from the presence of Corco's executive offices in San Antonio, that venue there would promote Corco's financial rehabilitation is, itself, suspect. The record produced before the Bankruptcy Court clearly indicates that Corco is geared to work, to litigate and generally to promote its financial wellbeing in Puerto Rico. As the Fifth Circuit observed:

> [A]ll of its assets are there; all of its production takes place there; 95% of its employees live there; 70% of its refined products sales and 88% of its petrochemical sales are made in Puerto Rico to entities physically located on the island (some of the entities are headquartered elsewhere and the contracts for the sales may be negotiated off-island); invoices are prepared and distributed from Puerto Rico; all original records are kept in Puerto Rico by virtue of Puerto Rican law; the debtor's data processing center is located in Puerto Rico; its audits are conducted in Puerto Rico; stockholders' and directors' meetings are held on the island; most of CORCO's current litigation, which is extensive with regard to both the number of suits and the dollar amounts involved, is going on in Puerto Rican courts (the next most utilized forum is New York); the majority of its creditors are in Puerto Rico; and Puerto Rico is its place of incorporation. 596 F.2d at 1246.

be better protected if these proceedings were moved to Puerto Rico.

The Commonwealth of Puerto Rico is a vivid example of a creditor and vitally interested party whom the Fifth Circuit's perception of debtor convenience could adversely affect. Corco has sued the Commonwealth of Puerto Rico and its top officials in San Antonio as a part of these proceedings.[4] That suit involves hundreds of millions of tax dollars and affects the entire petrochemical industry of Puerto Rico. If Corco rehabilitates itself by winning that suit in a location where the defendants are ill-equipped to defend themselves, it is no exaggeration to say the Government of Puerto Rico could be bankrupted. In its desire not to inconvenience Corco's executives, the Fifth Circuit has failed to evaluate the potential effects of its venue determination, such as the litigation against the Government of Puerto Rico, on the many parties other than Corco involved in these Chapter XI bankruptcy proceedings.

Corco is as well equipped to consumate a plan of arrangement in Puerto Rico as it is in San Antonio.[5] The

4. *Commonwealth Oil Refining Company, Inc., et al v. Commonwealth of Puerto Rico, et al,* pending in the United States District Court for the Western District of Texas, San Antonio Division, Bankruptcy No. SA-78-BK-147, Adversary Proceeding No. 120. The lawsuit challenges the constitutionality of the Commonwealth's oil excise tax pursuant to Act No. 6 of March 27, 1975 (codified in pertinent part at 13 L.P.R.A. §§ 4013, 4045A and 4060) and attacks the legality of a set-off by the Commonwealth of sums allegedly owing by PRWRA to Corco. Although tentatively resolved by agreement, the outcome is still subject to creditor objections and Court approval.

5. Not only do all of the tangible circumstances reflect Corco's ability to function effectively in court proceedings in Puerto Rico (*see* footnote 3, *supra*), Corco's Comptroller and Treasurer, the executive specifically charged with development of a plan of arrangement, testified that Corco's financial "thinking, planning and dealing" could continue just as well if these Chapter XI proceedings were transferred to Puerto Rico. (Tr. 446)

benefits the Fifth Circuit divined to support its interpretation of "principal place of business" are illusory. Simply stated, the overall interests which the Bankruptcy Act and Rules purport to serve are best served by having Corco deal in bankruptcy where it has chosen to deal in business.

The notion of "principal place of business" under Bankruptcy Rule 116, in light of the policy objectives of Chapter XI, should embody a more even-handed consideration of the interests of the creditors and other non-debtor parties than is reflected in the decision below.

2. THIS IS ONE OF THE LARGEST, MOST VISIBLE BANKRUPTCIES IN HISTORY AND THE DECISION BELOW BOTH AFFECTS A MYRIAD OF INTERESTS IN THESE PROCEEDINGS AND DISTORTS THE BALANCE OF AUTHORITIES AS TO BANKRUPTCY VENUE IN SUBSEQUENT PROCEEDINGS.

The very size of this bankruptcy, the number of parties involved in it, and the dimensions of the interests they are seeking to protect, cloak the ultimate determination of its venue with special import. Further, the concept of "principal place of business" on which the decision below is predicated is perpetuated in the Bankruptcy Act of 1978.[6] In view of the vast new powers which the new Act vests in every Bankruptcy Court on the basis of where a debtor has its "principal place of business," the decision below assumes enormous proportions.

Within the considerable ambit of interests affected by the decision below, there should not be lost those of the Commonwealth of Puerto Rico and its 3.3 million inhabitants. The historical role of the Commonwealth in

6. 28 U.S.C. § 1472.

the development of Corco's oil refining and petrochemical operations and the vital position Corco occupies in the development of the economy of Puerto Rico cannot be overemphasized.[7] Corco is a fundamental aspect of Puerto Rican life. It is the source of much of Puerto Rico's energy and most of its fuel and petrochemicals. Corco's largest single customer is PRWRA, which provides electrical power to an estimated 900,000 commercial, industrial and residential customers, and in turn generates revenues to Corco that range from $132,000,000.00 to $182,000,000.00 per year.[8] Corco also provides most of the other refined petroleum products and petrochemical needs of Puerto Rican consumers.[9] Therefore, the people of Puerto Rico literally depend upon Corco for their light, heat, power, safety and transportation. The overwhelming majority of Corco's employees, customers, and creditors, and a major portion of its sales and revenues are in Puerto Rico.[10] In short, the continued economic viability

7. The Affidavit in Support of Objection to Venue and Motion to Transfer submitted by Carlos Romero Barcelo, Governor of the Commonwealth of Puerto Rico, outlines in depth the symbiotic relationship between the Commonwealth and Corco. The Governor stated:

> The construction of Corco's refinery was the first major industrial project promoted by Puerto Rico pursuant to "Operation Bootstrap," a joint effort by the United States and Puerto Rico Governments to promote the development of the Puerto Rico economy. Because the establishment of a petroleum refining industry in Puerto Rico would provide a stable source of supply of residual fuel oils for the generation of Puerto Rico's electricity needs by the Puerto Rico Water Resources Authority, as well as the fuel and raw materials for other industries, refining was to be the cornerstone of this program of the Commonwealth Government for the development of the Puerto Rico economy.

8. Bankruptcy Opinion at 490. (All Bankruptcy Opinion references are to Transcript pages. Those page numbers appear in brackets in the Appendix.)

9. Id.

10. Bankruptcy Opinion at 486-90; Affidavit in Support of Objection to Venue and Motion to Transfer at 20-23.

of Corco is a prerequisite to a healthy and stable economy in Puerto Rico.

The Commonwealth of Puerto Rico and numerous other parties have substantial vested interests in this bankruptcy. Their ability to protect those interests will be significantly diminished if venue of these proceedings is not moved to Puerto Rico. Furthermore, by virtue of the size and visibility of this bankruptcy and the profound precedential effect its venue determination will have under the new Bankruptcy Act, the error of the decision below rises to a level deserving of this Court's attention and correction.

3. THE FIFTH CIRCUIT COURT OF APPEALS HAS FUNDAMENTALLY MISCONSTRUED THE VENUE PROVISIONS OF THE BANKRUPTCY ACT AND RULES IN CONFLICT WITH ITS OWN PRIOR DECISIONS AND THOSE OF OTHER CIRCUITS.

a. The role and meaning of "principal place of business" in the context of bankruptcy venue.

The Bankruptcy Act, § 2(a)(1) [11 U.S.C. § 11(a)(1)], governs venue in a Chapter XI proceeding.[11] Prior

11. Section 2(a)(1) is phrased in terms of jurisdiction. However, it has been settled for some time that this section relates primarily to venue. *Bass v. Hutchins,* 417 F.2d 692, 694-95 (5th Cir. 1969); *In re Eatherton,* 271 F.2d 199, 201-03 (8th Cir. 1959); Advisory Committee Note on Bankruptcy Rule 116 (1976). Prior to the adoption of Bankruptcy Rule 116 (a)(2), the courts had difficulty determining the "residence" or "domicile" of a corporation as a "person" under § 2(a)(1), and often concluded that residence and domicile must be identical in the instance of corporations for purposes of that section. Rule 116(a)(2) set to rest any ambiguity by stating that venue could only be filed where a corporation had its "principal

to 1973, Section 2(a)(1) was interpreted to limit the venue of a corporate debtor to its principal place of business.[12] However, in 1973 Bankruptcy Rule 116(a)(2) explicitly included the location of a corporation's principal assets as an alternative basis for venue.[13]

In the case *sub judice,* the Bankruptcy Court found Corco's principal place of business to be in San Antonio. The District Court reversed this finding and held that Puerto Rico was the principal place of business. The District Court finding was reversed by the Fifth Circuit, which affirmed the original finding of the Bankruptcy Court. The decision of the Fifth Circuit is erroneous and conflicts with the meaning attributed to "principal place of business" in numerous other decisions of the federal courts of appeals.

place of business" or "principal assets." *See* 1 *Collier on Bankruptcy* § 3.02(a) (vii) (15th ed. 1979). Section 1472 of the new Bankruptcy Code, which relates to venue in Chapter XI filings, is modeled after Section 2(a)(1) and perpetuates "principal place of business" and place of "principal assets" as alternate sites for venue.

12. *See* authorities cited *infra* at 14-15.

13. Bankruptcy Rule 116 was adopted pursuant to the authority granted to this Court in 28 U.S.C. § 2075. That section states:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, in the practice and procedure in cases under Title 11.
> Such rules shall not abridge, enlarge, or modify any substantive right.
> Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May and until the expiration of ninety days after they have been thus reported.

Bankruptcy Rule 116 is made applicable to filings under Chapter XI by virtue of Rule 11-13.
As to the impact of the Bankruptcy Rules on the Bankruptcy Act, see Advisory Committee's Introductory Note to the Preliminary Draft, reprinted in 1976 Collier Pamphlet Edition, Bankruptcy Act and Rules, Part II at 751-63.

The record adduced before the Bankruptcy Court is uncontroverted that Puerto Rico is the location of Corco's physical plant, its producing activities and operations, and its major property assets.[14] In addition, the record shows that Corco was incorporated in Puerto Rico, has always transacted business there, deals there with its largest single customer, PRWRA, and there effects the majority of its sales and has most of its creditors.[15] On the other hand, San Antonio is the location of Corco's executive offices.[16]

Predicated as it is on these facts, the decision below conflicts with the majority of circuit court opinions which have analyzed "principal place of business" under the Bankruptcy Act. The general rule is that a corporation has its principal place of business where its physical operations are conducted and where its principal assets are concentrated, in short, where is does its business. *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors,* 544 F.2d 449 (10th Cir. 1976); *In re Kerr's Inc.,* 253 F.Supp. 742 (D.C. N.Y.), *aff'd,* 360 F.2d 163 (2d Cir. 1966); *In re L. F. Popell Co.,* 221 F.Supp. 534 (D.C. N.Y.), *aff'd sub nom., L. F. Popell Co. v. Delta Air lines, Inc.,* 323 F.2d 50 (2d Cir. 1963); *In re Hudik-Ross Co.,* 198 F.Supp. 695 (D.C. N.Y.), *aff'd sub nom., In re S.O.S. Sheet Metal Co. v. Hudik-Ross Co.,* 297 F.2d 32 (2d Cir. 1961); *In re Flexton Corp.,* 208 F.2d 869 (2d Cir. 1953); *Lawrence v. Atlantic Paper & Pulp Corp.,* 298 F. 246 (5th Cir. 1924), *cert. denied,* 266 U.S. 606 (1924); *Dryden v. Ranger Refining and Pipe Line Co.,* 280 F. 257 (5th Cir. 1922), *cert. denied,* 260

14. Bankruptcy Opinion at 477, 489.
15. Bankruptcy Opinion at 477, 487-90.
16. Bankruptcy Opinion at 477-78.

U.S. 726 (1922); *In re Pusey & Jones Co.,* 286 F. 88 (2d Cir. 1922), *cert. denied,* 261 U.S. 623 (1922); *Continental Coal Corp. v. Roszelle Bros.,* 242 F. 243 (6th Cir. 1917). A minority of decisions have, when a company's plant operations or property are separated from its management, looked to the place from which the "supreme direction and command" of the company emanates. *In re Portex Oil Co.,* 30 F.Supp. 138 (D. Ore. 1939), *aff'd sub nom., Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45 (9th Cir. 1940); *Shearin v. Cortez Oil Co.,* 92 F.2d 855 (5th Cir. 1937); *In re Guanacevi Tunnel Co.,* 201 F. 316 (2d Cir. 1912); *Burdick v. Dillon,* 144 F. 737, 738 (1st Cir. 1906).

The decision below aptly notes this difference of approach, 596 F.2d at 1295, including within the Fifth Circuit. Compare *Shearin v. Cortez Oil Co., supra, with Dryden v. Ranger Refining & Pipeline Co., supra.* Nevertheless, the decision below vitiates the holding in *Dryden* and directly conflicts with the majority of cases in the other circuits in tying principal place of business inextricably and exclusively to the location of executive offices.

The decision below, however, casually dismisses the relevance of prior case law in its own circuit and in the circuits of other federal courts of appeals by pointing to the adoption of Bankruptcy Rule 116. The decision states that Rule 116(a)(2)'s inclusion of the location of a corporation's principal assets as an alternate site for venue obviates the necessity "to choose between the places of production and management." 596 F.2d at 1245. Yet, Rule 116(a)(2) does not offer a choice for venue between the place of production and the place of management; the choice is between where the debtor corporation "has had its principal place of business or its principal

assets." In many instances, as here, a corporation will have its principal place of business and its principal assets in the same place. Also as here, a temporary relocation of its management, to serve corporate purposes unrelated to the conduct of its business, such as to facilitate a merger with another company, should not alter the court's perception of the place where the corporation principally does its business.

Adoption of Bankruptcy Rule 116(a)(2) did not change the meaning of "principal place of business" from that applied under Section 2(a)(1) of the Bankruptcy Act.[17] The decision below holds that whenever the location of a corporation's principal assets is separate from that of its executive offices, no matter how remote from the company's operations those offices are, the location of that corporation's executive offices presumptively is its principal place of business. Such a construction of Rule 116(a)(2) is unwarranted, departs from earlier interpretations of "principal place of business" and detracts from the fundamental objectives of the bankruptcy laws.

Specifically, the Fifth Circuit's construction of Rule 116(a)(2) is inconsistent with the Tenth Circuit's recent holding in *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, supra,* which involved the alternative choice of venue in a Chapter X proceeding, pursuant to Rule 10-114(a)(1), between principal place of business and location of principal assets. *See also In re Marine Aircraft Corp.,* 118 F.Supp. 844 (S.D.N.Y. 1954). The Court in *Guarantee Acceptance Corp., supra,* citing the

17. Indeed, a major reason for the adoption of Rule 116(a)(2) was to resolve ambiguity that had existed under Section 2(a)(1) of the Bankruptcy Act as to the significance of "domicile" and "residence" in the case of a corporation or partnership. *See* footnote 11, *supra.*

opinion of the Fifth Circuit in *Dryden v. Ranger Refining & Pipeline Co., supra,* stated:

> [I]t may be said that the corporate headquarters and offices are not necessarily the principal place of business of the corporation. [Citations omitted.] The determination to be made is one of fact as to where in the main, the corporation does its business. 544 F.2d at 452.

In the decision below the Fifth Circuit never made such a determination. The assumption was that Rule 116(a)(2) embraces a different standard for the determination of "principal place of business" than the section to which that rule applies, Section 2(a)(1) of the Bankruptcy Act. The interpretation given to the term "principal place of business" in the decision below is based upon a fundamentally erroneous view of the effect of the adoption of Rule 116 and is inconsistent with the meaning attributed to that phrase in the great majority of bankruptcy cases which have considered it.

b) The role of diversity jurisdiction decisions in defining "principal place of business."

The decision below concludes that "principal place of business" may have a different meaning for diversity jurisdiction purposes [28 U.S.C. § 1332(c)] than it has under the Bankruptcy Act. Accordingly, the Fifth Circuit decided that precedents as to the meaning of "principal place of business" under the federal diversity statute (which were contrary to the Court's interpretation of that term in the decision below) were irrelevant. 596 F.2d at 1247 n.17. Yet, the key authority relied upon in the

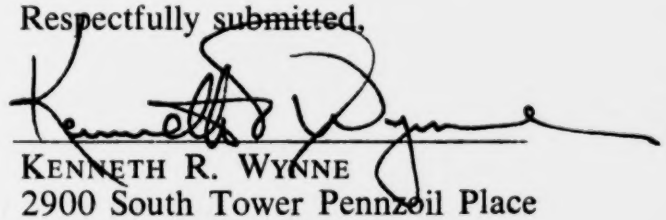
interpretation of "principal place of business" in *Anniston Soil Pipe Co. v. Central Foundry Co.*, 216 F.Supp. 473 (N.D. Ala.), *aff'd per curiam*, 329 F.2d 313 (5th Cir. 1964), a diversity jurisdiction case, was the Fifth Circuit's decision in *Dryden v. Ranger Refining & Pipeline Co., supra*, heretofore that circuit's foremost bankruptcy venue decision. In addition, the Sixth Circuit has held that there is no essential difference between the statutory standard for the meaning of "principal place of business" in 28 U.S.C. § 1332(c) and under the Bankruptcy Act. *Riggs v. Island Creek Coal Co.*, 542 F.2d 339, 341 (6th Cir. 1976); *see also Boggs v. Blue Diamond Coal Co.*, 432 F.Supp. 19 (E.D. Tenn. 1977).

The Fifth Circuit's new position that diversity jurisdiction precedent is irrelevant for purposes of determining "principal place of business" under the venue provisions of the Bankruptcy Act is repudiated by the legislative history of 28 U.S.C. § 1332(c). That statute utilizes "principal place of business" because of that concept's familiarity through the case law under the Bankruptcy Act. *See* Report of the Judicial Conference of the United States, Committee on Jurisdiction and Venue (1951), reported at 2 U.S. Code Cong. & Ad. News 3114, 3132-34 (1958); S.Rep. No. 1830, 85th Cong., 2d Sess., reprinted in 2 U.S. Code Cong. & Ad. News 3099, 3101-02 (1958).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,



KENNETH R. WYNNE
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

BENJAMIN RODRIGUEZ RAMON
Housing Investment Building
Suite 840
P. O. Box "SS"
Hato Rey, Puerto Rico 00919

Counsel for Petitioners

November 6, 1979

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on each of the following parties by placing the same, postage prepaid, certified mail, return receipt requested, in the United States Mail, on this the sixth day of November, 1979.

Sheinfeld, Maley & Kay
2130 Two Shell Plaza
Houston, Texas 77002

Rochelle, King & Balzersen
1435 Republic National Bank Building
Dallas, Texas 75201

George J. Wade
Shearman & Sterling
One Citicorp Center
153 E. 53rd Street
New York, New York 10022

James G. Ulmer, Esq.
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002

Burleson Smith, Esq.
Cox & Smith, Incorporated
600 National Bank of Commerce Building
San Antonio, Texas 78205

Howard C. Buschman, III, Esq.
Wilkie, Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10027

Patrick H. Swearingen, Jr., Esq.
Matthews, Nowlin, McFarlane & Barrett
1500 Alamo National Bank Building
San Antonio, Texas 78205

John Tower White, Esq.
Wender, Murase & White
400 Park Avenue
New York, New York 10022

Bond Davis, Esq.
Gresham, Davis, Gregory, Worthy & Moore
1800 Frost Bank Tower
San Antonio, Texas 78205

L. E. Dubon, Esq.
Dubon, Gonzalez & Berrios
Banco de Ponce Building, 15th Floor
GPO Box 6123
San Juan, Puerto Rico 00936

Vincente Zayas Puig, Esq.
Baragano, Arzuaga & Zayas
P. O. Box 4191-S
San Juan, Puerto Rico 00905

Francis & Doval
GPO Box CH
San Juan, Puerto Rico 00936

Escribano, Carreras, Aceuedo,
Perez & Varela
212 Mayaguez Street, Suite 3-B
Hato Rey, Puerto Rico 00917

E. Delgado Roque
GPO Box 5028
San Juan, Puerto Rico 00136

Anthony V. Ponzio, Esq.
United States Securities and Exchange
Commission
219 S. Dearborn Street
Chicago, Illinois 60604

James T. Eichstaedt, Esq.
Chief Counsel
Div. of Corporate Regulations
Securities and Exchange Commission
500 N. Capitol St.
Washington, D.C. 20549

Michael Paige, Esq.
Assistant General Counsel
U.S. Department of Energy
Washington, D.C. 20461

Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Robert Baker
c/o Commonwealth Oil Refining Company, Inc.
8626 Tesoro Drive
San Antonio, Texas 78217

Jack Hebdon, Esq.
Groce, Locke & Hebdon
2000 Frost Tower
San Antonio, Texas 78205

Joe Warren Jones, Esq.
615 National Bank of Commerce Bldg.
San Antonio, Texas 78205

Solicitor General
Department of Justice
Washington, D.C. 20530

KENNETH R. WYNNE

APPENDIX A

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

August 9, 1979

TO ALL PARTIES LISTED BELOW:

NO. 78-3019—In the Matter of: Commonwealth Oil Refining Co., Inc.
Commonwealth, etc. v. Commonwealth, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

Edward W. Wadsworth, Clerk

By: /s/ SALLY HAYWARD
Deputy Clerk

cc: Mr. Benjamin R. Ramon
Messrs. Kenneth R. Wynne
John T. Arnold
Mr. Robert C. Maley, Jr.
Mr. James C. Ulmer
Mr. George J. Wade
Messrs. J. Burleson Smith
R. Laurence Macon
David C. Spoor
Mr. Will M. Kahn

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

No. 78-3019

D. C. Docket No. CA SA 78 CA 223

In the Matter of: COMMONWEALTH OIL REFINING CO., INC., Bankrupt.
COMMONWEALTH OF PUERTO RICO and PUERTO RICO WATER RESOURCES AUTHORITY,
Appellants, Cross-Appellees,

versus

COMMONWEALTH OIL REFINING CO., INC., ET AL.,
Appellees, Cross-Appellants.

Appeal from the United States District Court for the Western District of Texas

Before COLEMAN, GODBOLD and INGRAHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the appellants pay to the appellees the costs on appeal, to be taxed by the Clerk of this Court.

June 13, 1979

ISSUED AS MANDATE:

APPENDIX C

In the Matter of: COMMONWEALTH OIL REFINING CO., INC., Bankrupt
COMMONWEALTH OF PUERTO RICO and Puerto Rico Water Resources Authority, Appellants Cross-Appellees,

v.

COMMONWEALTH OIL REFINING COMPANY, INC., et al., Appellees Cross-Appellants.

No. 78-3019

United States Court of Appeals, Fifth Circuit.

June 13, 1979.

Rehearing and Rehearing En Banc Denied August 9, 1979.

Debtor, a company engaged in the business of operating petroleum refinery and petrochemical facilities, filed a Chapter XI petition for reorganization in the San Antonio Division of the Western District of Texas. The Government of Puerto Rico and the Puerto Rico Water Resources Authority objected to venue and moved to transfer the proceedings to the United States District for the District of Puerto Rico. The United States District Court for the Western District of Texas, at San Antonio, Adrian A. Spears, Chief Judge, affirmed the bankruptcy court's denial of the transfer motions, and movants appealed. The Court of Appeals, Godbold, Circuit Judge, held that: (1) bankruptcy court was not clearly erroneous in locating the debtor's principal place of business in San

Antonio, where, inter alia, the debtor's corporate structure demonstrated that it managed most of its affairs from San Antonio, even though production is centered in Puerto Rico, and (2) bankruptcy court, after concluding that venue was proper in San Antonio, did not abuse its discretion in refusing to transfer the case to Puerto Rico, as the convenience of the parties and the interest of justice militated against a transfer to Puerto Rico.

Affirmed.

Benjamin R. Ramon, Hato Rey, P. R., Bracewell & Patterson, Kenneth R. Wynne, John T. Arnold, Houston, Tex., Cadwalader, Wickersham & Taft, New York City, for appellants cross-appellees.

Sheinfeld, Maley & Kay, Robert C. Maley, Jr., Houston, Tex., Rochelle, King & Balzersen, Dallas, Tex., for Commonwealth Oil Refining.

James G. Ulmer, Houston, Tex., George J. Wade, New York City, J. Burleson Smith, R. Laurence Macon, David C. Spoor, San Antonio, Tex., Will M. Kahn, New York City, for Tesoro.

Appeals from the United States District Court for the Western District of Texas.

Before COLEMAN, GODBOLD and INGRAHAM, Circuit Judges.

GODBOLD, Circuit Judge:

Commonwealth Oil Refining Company (CORCO), filed a Chapter XI petition for reorganization in the San

Antonio Division of the Western District of Texas on March 2, 1978.[1] On March 6 the Government of Puerto Rico and the Puerto Rico Water Resources Authority (PRWRA) objected to venue and moved to transfer the proceedings to the United States District Court for the District of Puerto Rico. Both the bankruptcy court and the district court denied the motions to transfer.

I. Proceedings below

[1-3] Venue for a Chapter XI case is proper in either the district where the debtor has "had its principal place of business or its principal assets for the preceding [six] months or for a longer portion thereof than in any other district." Fed.R.Bankr.P. 116(a)(2). All parties agree that Puerto Rico is where CORCO's principal assets are located. There is no agreement on the location of CORCO's principal place of business. CORCO contends that its principal place of business is San Antonio. Puerto Rico and PRWRA argue that it is Puerto Rico. The bankruptcy court concluded that San Antonio is CORCO's principal place of business and that venue is properly laid there. It refused to transfer the case. The district court reversed the findings that the principal place of business is San Antonio and that venue is proper in San Antonio, but nevertheless it retained jurisdiction pursuant to Bankruptcy Rule 116(b), which allows the court to retain a case "in the interest of justice and for the convenience of the parties" even though venue was improperly laid. Fed.R.Bankr.P. 116(b)(2). The discretion to retain such a case, however, must be used with caution and in few cases. *In re S.O.S. Sheet Metal Co.*,

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1. Eleven subsidiaries of CORCO filed reorganization petitions in the same court at the same time.

297 F.2d 32 (CA2, 1961). The bankruptcy court, on the other hand, having concluded that venue was proper in San Antonio, considered the motion to transfer under Bankruptcy Rule 116(b)(2), which allows the court to transfer a case to another district if "the interest of justice and . . . the convenience of the parties" would be better served by administering the case in the other district. Again, the court should exercise its power to transfer cautiously, *In re Bankers Trust,* 403 F.2d 16, 23 n. 10 (CA7, 1968), and the party moving for the transfer must show by a preponderance of the evidence that the case should be transferred, *In re Fairfield Puerto Rico, Inc.,* 333 F.Supp. 1187, 1189 (D.Del. 1971).

We reverse the district court's finding that CORCO's principal place of business is Puerto Rico and agree with the bankruptcy court that its principal place of business is San Antonio. We also conclude that the bankruptcy court did not misuse its discretion in refusing to transfer the case to Puerto Rico. We reach the same conclusion as the district court, that the case should remain in San Antonio, but we follow the reasoning of the bankruptcy court.

The location of a debtor's principal place of business is a question of fact. It is therefore necessary to set out in some detail the corporate structure of CORCO and its operations. We will then determine the legal definition of principal place of business. Finally, we consider whether the case should have been transferred under Rule 116(b)(1).

II. CORCO

CORCO, incorporated under the laws of Puerto Rico, is in the business of operating a petroleum refinery and

petrochemical facilities.[2] Its physical plant is located in Puerto Rico.[3] Prior to 1971 CORCO's executive offices were also located there. From 1971 to 1975 the offices were in New York City. In 1975, Tesoro Petroleum Corporation, headquartered in San Antonio, successfully tendered for a controlling share of CORCO's common stock.[4] In contemplation of a merger of the two companies, Tesoro had CORCO's executive offices moved to San Antonio in 1976. The merger plans have since been shelved, but CORCO's executive offices have remained in San Antonio.[5]

Although all of CORCO's production facilities are located in Puerto Rico, almost all of its executive officers live and office in San Antonio. The management of CORCO is divided into six departments: Planning and Economics, Operations, Marine Transportation, Refined Products Marketing, Petrochemicals Marketing, and Environmental Affairs. Each department is headed by a vice president. The vice presidents report to the executive vice president who in turn is responsible to the president and chief executive officer. Both the president and executive

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2. Most of CORCO's petrochemical facilities are operated as joint ventures. For purposes of this opinion, it is not necessary to explain the legal relationships between the joint ventures and CORCO.

3. The refinery and petrochemical facilities are valued at $545,000,000. The replacement cost of the facilities is estimated at one billion dollars.

4. Tesoro owns 36.7% of CORCO's common stock.

5. Rule 116(a)(2) is concerned with the location of the debtor's principal place of business only for the six months preceding the bankruptcy filing. The prior locations of CORCO's executive headquarters, therefore, is of no relevance to the issue in this case. Nor is it of any significance that CORCO moved its offices to San Antonio at the request of Tesoro. CORCO's offices are in San Antonio and have been there for the relevant period under Rule 116(a)(2).

vice president work out of San Antonio. Of the six department heads, four live in San Antonio; one, vice president of Refined Products Marketing, lives in McLean, Virginia; and one, senior vice president of Operations, lives in Puerto Rico. There are two other vice presidents, the general counsel and secretary and the comptroller and treasurer; both live in San Antonio. Directly below the vice president level of management is a group of general managers and directors. Both the director of Personnel and director of Public Affairs live in San Antonio. There are three general managers—Joint Ventures, Operations and Supplies, and Refined Products Liason. All three live in San Antonio.

An analysis of the jobs performed by CORCO's management reveals that the company's physical operations are controlled from San Antonio. This is best seen by an explanation of the process through which CORCO purchases feedstocks for its facilities and ultimately sells its products to customers.

A starting point in describing the process is the CORCO Operating Team. The function of the team is to prepare what is called the Operating Plan. The plan outlines how the refining and petrochemical facilities should operate for the upcoming 60 or 90 day period, the amount of each product that should be produced, and the facility that should produce it. Because of constant changes in the market the plan must continually be updated. This is accomplished at the weekly or semi-weekly meetings of the team. The team consists of the heads of all the departments or their designated representatives.

Input into the plan necessarily comes from all departments. The general manager for Supplies and Refined Products Liaison reports on the availability of raw materials and their prices. Marine Transportation must find available means for transporting the raw materials to Puerto Rico and some of the finished product to off-island customers. Both the Petrochemical and Refined Products Marketing departments estimate the quantities of products that can be sold. The Operations department estimates the quantities of the different products that can be produced. The Planning and Economics department is charged with assimilating all of these factors, supplies transportation, production and sales, and coming up with a plan that will result in the most profitable mix of products and quantities.

The bankruptcy court found that the Operating Plan is not a statement of general policy but rather a detailed production schedule. We agree. The people in charge of operations at the refinery are not authorized to substantially deviate from the production schedule in the plan. Because of the upstream and downstream effect of any substantial deviation on the rest of CORCO's operation, changes must be cleared through San Antonio and the appropriate changes made in the transportation needs and marketing aspects of CORCO's business. There is, of course, some delegated authority to make adjustments in production. The refinery is given latitude to cope with emergencies, and in some instances the plan delegates options for the Puerto Rico personnel to choose from.[6]

6. Appellants make much of the fact that the actual production of various products has often failed to meet the schedule laid out in the plan. They infer from the deviations that the refinery personnel have substantial authority to change the operating plan. The evidence is to the contrary. CORCO's general manager of operations explained that a significant portion of the deviations resulted from San Antonio decisions to shut down certain producing units for necessary maintenance.

This limited delegation of authority, however, does not alter the basic fact that the purchase of feedstocks, the refining process, and the transportation of both is directed from San Antonio.[7]

The financial heart of CORCO is located in San Antonio.[8] The comptroller and treasurer works out of San Antonio. He is charged with the normal responsibilities of a comptroller and treasurer: managing bank accounts, payment of taxes and preparation of financial reports. In addition, all of CORCO's expenses, except for those directly related to the refinery in Puerto Rico, are paid out of the San Antonio office. The weekly $20,000,000 bill for feedstocks is paid from San Antonio. The payroll for the refinery workers is prepared in Puerto Rico.

CORCO's financing is run by people who work in San Antonio. Although many of CORCO's loan agreements are negotiated and executed in New York, the people responsible for the negotiations work out of San Antonio. The only significant task relating to the financial management of CORCO that is performed in Puerto Rico is the maintenance of the corporate books, the corporate audit, and the billing of customers. CORCO maintains its original books in Puerto Rico as required by Puerto Rican law.[9] CORCO's tax returns, however, are prepared in San Antonio.

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7. The evidence indicates that it is not unusual in the petroleum industry to control the refining process from offices geographically distant from the physical plant.

8. Since the filing of the Chapter XI petition the bank group providing post-petition financing has exerted substantial control over the financial workings of CORCO. Money received by CORCO from its sales is paid into a special account controlled by the lending banks.

9. From a computer terminal in San Antonio, CORCO's officers have immediate access to its records.

In addition to the location of CORCO's physical plant in Puerto Rico, most of its products are sold to customers located in Puerto Rico. CORCO's sales team is divided into two departments, refined products and petrochemicals. CORCO's largest refined product customer is PRWRA, which purchased over 9,000,000 barrels of oil in 1977 for an approximate price of $132,700,000.[10] An employee stationed in Puerto Rico, the general manager of marketing,[11] services CORCO's account with PRWRA. This general manager, however, does not have the authority to commit CORCO to delivery of residual fuel oil to PRWRA. After PRWRA has informed CORCO's general manager that it wants to purchase fuel, the vice-president for Refined Products Marketing is informed, who then checks with the operating team to determine the availability of the product. Based on the information the vice-president receives, he either approves or disapproves of the sale. Only this vice-president is authorized to bind CORCO in a sales agreement.

CORCO sold $198,000,000 worth of gasoline to other customers in Puerto Rico during 1977. The contracts for these sales are negotiated in the home offices of companies that sell gasoline in Puerto Rico. Of the five gasoline contracts, four were negotiated and executed in the mainland and only one in Puerto Rico. CORCO's Virginia office is responsible for negotiating the contracts and servicing the accounts.

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10. The bankruptcy court opinion lists the value of the sales at $182,000,000. The court was referring to the estimated sales projections for 1978.

11. The use of the title general manager for corporate officers of CORCO is confusing. The general managers stationed in San Antonio are heads of departments. The general manager who services the PRWRA account is not a department head.

The sale of refined products to mainland customers resulted in revenues of $190,000,000 in 1977. Most of these sales were made to customers on the Northeast coast of the United States. People working out of CORCO's Virginia office are responsible for these sales. No sales are actually consummated, however, until the Virginia office has checked with San Antonio on the availability of the products.

The petrochemical marketing department is stationed in San Antonio. Over 80% of the petrochemicals produced by CORCO are either sold to CORCO's joint venturers located in Puerto Rico or to CORCO's refinery for refining into gasoline.[12] Most of the remaining production is sold to mainland customers. For sales of $110,000,000 in 1977, all but $9,000,000 were sold off-island. The contracts for the petrochemical sales were negotiated either at the home office of the purchasers or in San Antonio.

This overview of CORCO's operation reveals that production is centered in Puerto Rico and that management is centered in San Antonio. CORCO's supplies come from off-island sources, but a majority of CORCO's production is sold to customers located in Puerto Rico.[13] With this factual basis we consider the location of CORCO's principal place of business.

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12. The record is silent on who or where decisions are made concerning sales of petrochemicals to joint venturers or to CORCO's refinery.

13. For example approximately 52% of the gasoline produced by CORCO is sold for use in Puerto Rico; 90% of its aviation fuel; 44% of its middle distillate; 70% of its residual fuel; and 38% of its aromatics.

III. Venue in Chapter XI proceedings

A history of the Chapter XI venue provision is essential to an understanding of the meaning of principal place of business. Prior to the adoption of the current Chapter XI venue provision in 1973, Section 2(a)(1) of the Bankruptcy Act, 11 U.S.C. § 11(a)(1), limited venue for Chapter XI cases to the corporation's principal place of business.[14] Chapter X of the Bankruptcy Act, on the other hand allowed for venue in both the district where the corporation maintains its principal place of business or its principal assets.[15] Rule 116(a)(2) changed the Chapter XI venue provision to conform to Chapter X's standards.[16] The change is significant for at least

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14. Section 2(a)(1) provides in relevant part:

> The courts of the United States hereinbefore defined as courts of bankruptcy are . . . hereby invested . . . with such jurisdiction at law or in equity as will enable them to . . .
>
> (1) Adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction. . . .

Although the statute is couched in terms of jurisdiction, prior to passage of Rule 116 it was interpreted as a venue provision. *See Bass v. Hutchins*, 417 F.2d 692, 694-95 (CA5, 1969). It was, therefore, within the power of the Supreme Court to promulgate a Bankruptcy Rule altering § 2(a)(1)'s venue provision. *See* 28 U.S.C. § 2075; Note, 52 N.Y.U. L. Rev. 362, 367 n.34 (1977).

15. 11 U.S.C. § 528. The statute provides that

> If no bankrupcty proceeding is pending, an original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction.

Id.

16. *See* Advisory Committee's Note to Rule 116(a). Rule 116 is made applicable to Chapter XI through Rule 11-13(a)(1). The venue provision for Chapter X is contained in Rule 10-114. It continues to allow venue at either the debtor's principal place of business or where its principal assets are located.

two reasons. First, it sheds some doubt on the validity of old case law construing Chapter XI's prior venue statute. Second, the change indicates an intent to expand the districts where a Chapter XI debtor may file by appreciating the fact that a debtor's principal place of business is not necessarily at the same location as its principal assets.

Prior to the adoption of Rule 116, the courts were divided on the question whether a debtor's principal place of business is located in the district where the debtor maintains its general offices or in the district where the debtor operates its production facilities. *Compare Dryden v. Ranger Refining & Pipe Line Co.*, 280 F. 257 (CA5), *cert. denied,* 260 U.S. 726, 43 S.Ct. 89, 67 L.Ed. 483 (1922), and *Continental Coal Corp. v. Rozelle Bros.*, 242 F. 243 (CA6, 1917), with *Shearin v. Cortez Oil Co.*, 92 F.2d 855 (CA5, 1937), and *Burdick v. Dillon,* 144 F. 737 (CA1, 1906). Although all courts agreed that the location of a debtor's principal place of business is a question of fact, either production or management facts were emphasized, depending on the circuit's preference.

This circuit has to some extent been inconsistent in its treatment of this issue. In *Dryden,* the debtor maintained its general office in Kansas City, Missouri. The debtor was in the business of producing, refining, and selling oil and gas. Most of its refineries and producing wells were located in the Northern District of Texas. Most of the debtor's contracts were made and filled in the Northern District. Money owed the debtor on these contracts was also collected in the Northern District. On these facts the court concluded that the debtor's principal place of business was located in the Northern District. In the later case, *Shearin,* this court expressed a preference for locating a debtor's principal place of business in the district where the debtor manages its affairs. In *Shearin,* the debtor's oil wells and the place where it delivered its product was in the Southern District of Texas. The place from where the debtor managed its business, however, was in the Northern District of Texas. The court chose the Northern District as the principal place of business.

Dryden and *Shearin* are inconsistent in the language they use in reaching their conclusion on the location of the debtor's principal place of business, but they are reconcilable on their individual facts. *Dryden* ruled out the situs of production as a litmus test for locating a corporation's principal place of business. The court recognized that in an appropriate case the place "from which general supervision of [the debtor's] business is exercised, may be properly held to be the principal place of business." 280 F. at 263. *Shearin* was an appropriate case. All of the debtor's business was managed from its offices in the Northern District. The emphasis in *Shearin* was on the place where the debtor deals with the public.

Since the adoption of Rule 116 it is no longer necessary to choose between the places of production and management. The emphasis of earlier decisions on the location of the debtor's production facilities is no longer appropriate because the location of the debtor's principal assets is now an independent basis of venue. Although relevant to an inquiry into a debtor's principal place of business, the change in Rule 116 has greatly diminished its significance. The case law developed under Chapter

X's venue provision, which has always contained Rule 116's alternative basis for venue, is now relevant to venue under Chapter XI. We agree with the court's conclusion in *In re Portex Oil Co.*, 30 F.Supp. 138 (D.Or. 1939), *aff'd sub nom. Clark Bros. Co. v. Portex Oil Co.*, 113 F.2d 45 (CA9, 1940), that

> A distinction must have been intended between the two points where jurisdiction could be founded, although often the principal assets will be at the principal place of business. The intent must have been to permit a corporation which habitually transacted its corporate business at some point to bring proceedings there.
>
> * * *
>
> [T]he distinction noted in the statute permits administration if the petition is filed in the district where the principal place of business is located, for the very purpose of allowing the internal administration of a company to be settled at the point where those interested in it chose primarily to conduct its business.

Id. at 140.

[4] Allowing venue in the district where a debtor manages its business is particularly appropriate in both Chapter X and XI cases. A corporate arrangement or reorganization is primarily a financial proceeding. The debtor is maintained as a going enterprise and its finances are put back in order. *See* Note, 52 N.Y.U. L. Rev. 362, 362 n.5 (1977). Where the corporation transacts its corporate business is a logical place for venue in such proceedings.

[5] Our review of CORCO's corporate structure demonstrates that it manages most of its affairs from San

Antonio. The feedstocks for its facilities are purchased by people working out of the San Antonio office. The transportation of the raw product to Puerto Rico is arranged from San Antonio. The operation of the refineries is directed from San Antonio. The sale of its refined products is managed from Virginia, and the sale of petrochemicals is managed from San Antonio. The people who deal with the Department of Energy and other federal agencies are stationed in San Antonio. On these facts, we conclude that the bankruptcy court was not clearly erroneous in locating CORCO's principal place of business in San Antonio.

The district court relied exclusively on this court's opinion in *Dryden* for reversing the bankruptcy court's conclusion that CORCO's principal place of business is in San Antonio. The court stated "that the facts compel the conclusion that application of the tests set forth in *Dryden* . . . fix the debtor's principal place of business in Puerto Rico." In a footnote the court listed the following facts in support of its conclusion:

> all of its assets are there; all of its production takes place there; 95% of its employees live there; 70% of its refined products sales and 88% of its petrochemical sales are made in Puerto Rico to entities physically located on the island (some of the entities are headquartered elsewhere and the contracts for the sales may be negotiated off-island); invoices are prepared and distributed from Puerto Rico; all original records are kept in Puerto Rico by virtue of Puerto Rican law; the debtor's data processing center is located in Puerto Rico; its audits are conducted in Puerto Rico; stockholders' and directors' meetings are held on the island; most of CORCO's current litigation, which is extensive with regard to both

> the number of suits and the dollar amounts involved, is going on in Puerto Rican courts (the next most utilized forum is New York); the majority in number of its creditors are in Puerto Rico; and Puerto Rico is its place of incorporation.

As already indicated, the location of a debtor's assets is not particularly significant since the adoption of Rule 116. The location of employees is, of course, tied to the location of assets. Many more workers are needed to run a refinery than to manage one. The district court mentions the physical location of CORCO's customers but does not give sufficient consideration to where the sales are negotiated and who in the corporate structure is charged with sales responsibility. Where the invoices are prepared is significant, but where CORCO pays its bills is of equal importance. The office of the comptroller and treasurer is located in San Antonio. The other factors mentioned by the district court, location of records, where audits are performed, directors' and stockholders' meetings are held, and the location of CORCO's current litigation are all relevant factors, but the inquiry should not have stopped there. Although the district court's citation to *Dryden* is somewhat cryptic, the lower court must have proceeded on the understanding that the location of a debtor's principal assets is its principal place of business. Dicta in *Dryden* might support such an assumption, but adoption of Rule 116 has vitiated whatever validity that dicta once had. Moreover, the *Dryden* court eschewed any attempt to set a firm rule and recognized that general supervision of a corporation's business can constitute a corporation's principal place of business. The district court should have considered that management of all aspects of CORCO's business emanates from San Antonio.

[6, 7] For the district court to reverse the bankruptcy court's conclusion that San Antonio is CORCO's principal place of business it had to conclude that the bankruptcy court's finding was clearly erroneous. *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors,* 544 F.2d 449, 459 (CA10, 1976); *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45, 47 (CA9, 1940). Our review of the facts and the relevant legal principles convinces us that the bankruptcy court's finding was not clearly erroneous.[17]

IV. Transfer of venue

[8] Even though venue in San Antonio was proper, it was still within the bankruptcy court's discretion to

17. The government of Puerto Rico relies heavily on *Anniston Soil Pipe Co. v. Central Foundry Co.,* 216 F.Supp. 473 (N.D. Ala. 1963). There, the district court concluded that for purposes of diversity jurisdiction, 28 U.S.C. § 1332(c), a corporation's principal place of business is the place where a corporation has its physical assets, not its executive offices. We intimate no view on the correctness of the *Anniston* decision. Rather, we conclude that it is irrelevant. The diversity statute was amended in 1958 to give corporations dual citizenship; in addition to the traditional citizenship in the state of incorporation, a corporation would also be considered a citizen of the state where it has its principal place of business. The purpose of the amendment was to reduce the availability of diversity jurisdiction. S.Rep. No. 1830, 85th Cong., 2d Sess. (1958), *reprinted in* U.S. Code Cong. & Admin. News, 1958, pp. 3099, 3100. The adoption of Rule 116, on the other hand, was intended to expand venue choices for bankruptcy proceedings. Moreover, one of the purposes of diversity jurisdiction is to protect nonresidents from any possible prejudice they might encounter in local courts. *Bank of the United States v. Deveaux,* 9 U.S. (5 Cranch) 61, 87, 3 L.Ed. 38, 45 (1809). *See generally* Friendly, *The Historic Basis of the Diversity Jurisdiction,* 41 Harv. L. Rev. 453 (1928). A court fixing of a corporation's principal place of business would naturally try to implement this policy. No similar concern informs locating a corporation's principal place of business for bankruptcy proceedings. The policy concerns guiding each choice have little or nothing in common. 1 J. Moore, Federal Practice ¶ 0.77 [3.-4.], (2d ed. 1978). The *Anniston* decision is not persuasive in this context.

transfer the case to Puerto Rico. Fed. R. Bankr. P. 116 (b)(1). The court declined to do so, and we conclude that there was no abuse of discretion. *In re Tonkawa Refining Co.*, 502 F.2d 1341, 1343 (CA10, 1974).[18] The two general considerations the rule instructs the court to take into account are the convenience of the parties and the interest of justice.

[9] Under the heading of convenience of the parties the bankruptcy court listed six factors:

(1) The proximity of creditors of every kind to the Court;

(2) The proximity of the bankrupt (debtor) to the Court;

(3) The proximity of the witnesses necessary to the administration of the estate;

(4) The location of the assets;

(5) The economic administration of the estate;

(6) The necessity for ancillary administration if bankruptcy should result.

None of the parties has questioned the propriety of these considerations, nor have they suggested any additional ones.

The bankruptcy court correctly concluded that the most important consideration is whether the requested transfer would promote the economic and efficient administration

18. There is no need to consider whether the district court abused its discretion in retaining the case after it concluded that venue in San Antonio was improper, because of our conclusion that venue was proper in San Antonio.

of the estate. On the efficiency side, San Antonio is clearly the favored district. The heart of a Chapter XI proceeding is working up a financial plan of arrangement acceptable to all relevant parties. The people charged with this responsibility in CORCO's managament are all located in San Antonio. The bankruptcy court also found that the debtor's estate could be administered more economically in San Antonio. We cannot conclude that the bankruptcy court's finding was clearly erroneous.

[10] The next group of considerations concern the proximity to the court of the creditors (and stockholders), the debtor, and necessary witnesses. By far the largest group of creditors numerically is located in Puerto Rico. On the other hand, the creditors with the largest claims have either urged retention of the proceeding in San Antonio or are located in San Antonio. The bankruptcy court decided to give more importance to the location and desires of the creditors holding the largest claims. We think this was inappropriate. To confirm a plan of arrangement under Chapter XI, it must be accepted by both a majority of creditors and by creditors holding a majority in amount claimed against the debtor. 11 U.S.C. § 762. Both number and size are of equal significance in gaining acceptance of a plan and should be of equal significance in considering the convenience of the creditors. Tesoro Petroleum, located in San Antonio, owns 37.6% of CORCO's common stock. This makes San Antonio the area with the largest number of stockholders. Only 1.62% of CORCO's shareholders are residents of Puerto Rico. On balance, the proximity of creditors and stockholders favors San Antonio.

The proximity of the debtor is evident. The concern is with the corporation's employees who must appear in

court, not with the employees who are on the production line. CORCO's management is in San Antonio. This also answers the concern with the availability of witnesses. Most of the witnesses who must appear in court are stationed in San Antonio.

The next set of factors is the location of books, records and assets. Although most of CORCO's original books and records are in Puerto Rico, instant access through CORCO's computer system is available in San Antonio. The fact that the original set is maintained in Puerto Rico, therefore, is of little significance in weighing the relative convenience of the two forums. CORCO's assets are in Puerto Rico. This is of little importance in a Chapter XI proceeding where the goal is financial rehabilitation, not liquidation. *See In re Banker's Trust,* 403 F.2d 16, 23-24 (CA7, 1968).[19]

Finally, the bankruptcy court considered the need for ancillary administration in the event that liquidation occurs. As the court stated in *In re Fairfield Puerto Rico, Inc., supra* at 1191, "[a]nticipation of the failure of the Chapter XI proceeding is an illogical basis upon which to predicate a transfer."[20]

In addition to considering the convenience of the parties, Rule 116(b)(1) also instructs the court to account

19. The location of the debtor's assets would be an extremely significant consideration in a liquidation proceeding.

20. The government of Puerto Rico argues that the case should be transferred because of the extensive litigation between CORCO and other entities in Puerto Rico where Spanish civil law applies. Much of that litigation will not be in the bankruptcy court and will proceed in the appropriate court in Puerto Rico. The litigation involving Spanish civil law in the bankruptcy court could probably be handled more conveniently in Puerto Rico. By itself, however, that is insufficient reason to transfer the case.

for the interest of justice. The main concern that this implicates is the importance of CORCO to the welfare and economic stability of Puerto Rico and its people. Because CORCO is a major supplier of petroleum products to Puerto Rico, both the economy and the people of Puerto Rico are vitally concerned with the outcome of the Chapter XI proceeding. The government contends that the overwhelming concern of Puerto Rico with the continued operations of CORCO require a transfer of this case to Puerto Rico. We disagree. Without belittling in the least the extent of Puerto Rico's interest in CORCO, that interest is served by maintaining CORCO as a functioning refinery. This can best be accomplished in San Antonio. The troubles of CORCO are financial. The people who can solve those problems for CORCO are in San Antonio. The bankruptcy court found, and we cannot say it is clearly erroneous, that it will be less disruptive to the continued operation of CORCO if this case is retained in San Antonio.

V. Conclusion

We conclude that CORCO's principal place of business is San Antonio. The bankruptcy court could have nevertheless transferred the case in its discretion to Puerto Rico. It was not an abuse of discretion to refuse to do so.

Thus we conclude that the bankruptcy court must be affirmed. Our ultimate conclusion is the same as that reached by the district court, though arrived at by a different route.

The judgment of the district court is AFFIRMED.

APPENDIX D

[1698]

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BANKRUPTCY NO. SA-78-BK-147

(CHAPTER XI)

(JOINTLY ADMINISTERED)

IN RE:

COMMONWEALTH OIL REFINING COMPANY, INC., et al
DEBTORS

APPEAL FROM BANKRUPTCY COURT

ORDER

Came on for consideration the appeal of the Commonwealth of Puerto Rico and the Puerto Rican Water Resources Authority, hereinafter referred to as "appeallants", from the bankruptcy court's Memorandum Opinion of May 25, 1978, and Order of June 20, 1978, denying appellants' objection to venue and motion to transfer. The Commonwealth Oil Refining Company, Inc., the debtor-in-possession in the Chapter XI proceeding below; Citibank, N.A.; The Chase Manhattan Bank, N.A.; Chemical Bank; First National Bank of Boston; Irving

Trust Company and Bank of America have appeared as appellees in this proceeding. No oral argument having been requested by either party, and it appearing to the Court upon examination of the record that none was necessary, the Court has considered the record designated by the parties and the briefs of counsel in weighing the merits of this appeal.

In their first point, the appellants contend that the court below applied an incorrect legal standard in making its determination that the Commonwealth Oil Refining Company, Inc., hereinafter "CORCO", has its principal place of business in San Antonio, Texas. The legal standard applied by the court appears at page 16 of its Memorandum Opinion:

> CORCO's principal place of business under Bankruptcy Rule 116(a) is a question of fact to be determined on a case by case basis and lies totally within the sound discretion of this Court. (Mem. Op. 16)

[1699]

The appellants challenge that part of the above statement which characterizes a decision concerning a debtor's principal place of business as one that lies "totally within the sound discretion of this Court." Upon review of the cases cited by the court below in support of this proposition, this Court has been unable to find any support for it. It is the opinion of this Court that the above-quoted statement should be, and the same is hereby, modified to read as follows:

> CORCO's principal place of business under Bankruptcy Rule 116(a) is a question of fact to be determined on a case by case basis.

The appellants next contend that the court below erroneously found that the debtor's principal place of business is located in San Antonio, Texas, from which the court concluded that the Western District of Texas is a proper situs for the Debtor's Chapter XI proceedings. Despite the unfortunate choice of words used by the court below to express the legal standard applied to such determinations, this Court, upon a review of the Memorandum Opinion, is convinced that the bankruptcy judge made a factual determination concerning the principal place of business of CORCO. As such, the bankruptcy court's finding is to be evaluated by this Court under the standard set forth in Bankruptcy Rule 810:

> . . . The Court shall accept the referee's findings of fact unless they are clearly erroneous . . .

The meaning of the phrase "clearly erroneous" as it applies to a finding of fact has been defined by the Supreme Court of the United States as follows:

> . . . when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1947).

This Court, upon a review of the transcript of the hearing on the venue issue held before the bankruptcy court, the record designated by the parties, and the briefs of counsel, is of the opinion that a mistake was committed herein by the court below in finding that CORCO's

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principal place of business lies in San Antonio, Texas. This Court believes that the facts compel the conclusion that application of the tests set forth in *Dryden v. Ranger Refining and Pipeline Co.*, 280 F. 257 (5th Cir. 1922), fix the debtor's principal place of business in Puerto Rico.[1] Accordingly, that portion of the Memorandum Opinion which finds the debtor's principal place of business to be San Antonio, Texas, is hereby REVERSED.

The Court next considered the issue of ultimate importance in this appeal. The appellants contend that the court below erred in denying their motion to transfer CORCO's Chapter XI proceedings from the Western District of Texas to the District of Puerto Rico. The decision of the court below concerning the transfer issue is subject to reversal only upon a showing that an abuse

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1. The facts in the record which point to a conclusion that the debtor's principal place of business is located in Puerto Rico are: all of its assets are there; all of its production takes place there; 95% of its employees live there; 70% of its refined products sales and 88% of its petrochemical sales are made in Puerto Rico to entities physically located on the island (some of the entities are headquartered elsewhere and the contracts for the sales may be negotiated off-island); invoices are prepared and distributed from Puerto Rico; all original records are kept in Puerto Rico by virtue of Puerto Rican law; the debtor's data processing center is located in Puerto Rico; its audits are conducted in Puerto Rico; stockholders' and directors' meetings are held on the island; most of CORCO's current litigation, which is extensive with regard to both the number of suits and the dollar amounts involved, is going on in Puerto Rican courts (the next most utilized forum is New York); the majority in number of its creditors are in Puerto Rico; and Puerto Rico is its place of incorporation.

of discretion was committed. *Clark Bros. Co. v. Portex Oil Co.*, 113 F.2d 45, 48 (9th Cir. 1940). While the bankruptcy court, in accordance with its finding that San Antonio, Texas, is the debtor's principal place of business, assigned the burden of proof on the issue of transfer to the appellants, the shift in that burden to the appellees necessitated by this Court's finding that Puerto Rico is the debtor's principal place of business is not necessarily fatal to the validity of the lower court's findings that the interest of justice and convenience of the parties will best be served by

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retention of the proceedings in the Western District of Texas. While it is true that discretion to retain jurisdiction in the interest of justice and for convenience of the parties where venue is improperly laid should be exercised with great caution and in few cases, *In re S.O.S. Sheet Metal Co., Inc.*, 297 F.2d 32 (2nd Cir. 1961), this Court is of the opinion that the exercise of discretion to retain jurisdiction is proper in this case under Bankruptcy Rule 116(b)(2). The court below addressed all of the considerations which have been held to control the determination of whether a transfer of the proceedings would better serve the interests of justice and the convenience of the parties. (Mem. Op. 20-24). The majority of its findings on these issues originated in evidence introduced by the debtors. In addition to the factors cited by the bankruptcy judge, certain considerations apparent in this particular proceeding deserve mention. The debtor's arrangement proceedings have been underway in the Western District of Texas for approximately six months at

this writing. The bankruptcy court in this district is intimately familiar with the progress and present status of the arrangement proceedings and the problems present in them. While the debtor's principal place of business is located in Puerto Rico, the great majority of the people charged with its management are in the Western District of Texas. Their importance to the ongoing operations of the debtor is well documented by the court below (Mem. Op. 3-9A). While their presence here and the functions they perform do not make the Western District of Texas the Debtor's principal place of business, it is the management personnel who will be looked to by the court during the arrangement proceedings to ensure a successful outcome. Their immediate access to the Court is imperative if there is to be any chance of a successful arrangement. To require the debtor's management to travel to Puerto Rico to attend court proceedings there as often as their presence will most certainly be required would disrupt their daily managerial duties to an extent that would render the potential

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success of these arrangement proceedings doubtful from the outset. In addition, the burden of transportation expenses necessary to give management constant access to a Puerto Rican court would be a considerable drain on an already overextended estate, and it is apparent that the institutional lenders prefer that venue be retained in San Antonio.

The creditors, of course, are also entitled to full access to the court. They are represented by a creditors' committee in arrangement proceedings, however, and would

suffer little, if any, less hardship were this proceeding to be transferred.

Finally, the interest in this arrangement proceeding held by the Puerto Rican people must be addressed. The central role played by CORCO in the social and economic well-being of the Commonwealth cannot be denied. Were this a liquidation proceeding, it should certainly take place in Puerto Rico. Should it become apparent that a liquidation proceeding is imminent, a transfer of the case will certainly be proper, as the court below has acknowledged (Mem. Op. 25). But to proceed on the assumption now that CORCO's efforts to revitalize itself and rearrange its debt structure are doomed to failure, and that liquidation will result, is not a proper basis for transfer. The bankruptcy court in San Antonio is fully cognizant of the interrelationship of CORCO's fate with that of Puerto Rico, (Mem. Op. 13-14, 24-25), and there is no basis upon which to conclude that the court will not proceed with the interests of the Puerto Rican people in mind. Accordingly, the bankruptcy court's order denying the appellants' motion to transfer is hereby AFFIRMED.

It is SO ORDERED.

Entered at San Antonio, Texas, this 25th day of August, 1978.

/s/ ADRIAN A. SPEARS
Adrian A. Spears
United States District Judge

APPENDIX E

* * *

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IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

BANKRUPTCY NO. SA-78-BK-147

(CHAPTER XI)

(JOINTLY ADMINISTERED)

IN RE:

COMMONWEALTH OIL REFINING COMPANY,
INC., et al
DEBTORS

MEMORANDUM OPINION

At San Antonio, Texas, on the 15th day of May, 1978, came on for hearing the Objection to Venue and Motion to Transfer (the "Motion") filed by The Commonwealth of Puerto Rico (The "Commonwealth") and the Puerto Rico Water Resources Authority (the "Authority") or ("PRWRA") to transfer these proceedings from this district to the United States District Court for the District of Puerto Rico, in San Juan, Puerto. The Commonwealth and the Authority were joined in the Motion by Transocean Gulf Oil Company, Banco de Ponce,

Banco Popular de Puerto Rico, Banco Credito y Ahorro Ponceno, Union Independiente de al Industria de Petroquimicas de Puerto Rico, State Insurance Fund of The Commonwealth of Puerto Rico and the Securities and Exchange Commission of the United States. The United States Department of Energy filed Amicus Curiae.

The Debtors, ("CORCO") filed their response to the Motion, opposing the transfer of this case from this district. The Debtors were joined in their opposition to a change of venue by Citibank, N.A., the Chase Manhattan Bank, N.A., Chemical Bank, First National Bank of Boston, Irving Trust Company and Bank of America, and Tesoro Petroleum Corporation.

The following memorandum opinion constitutes this Court's findings of fact and conclusions of law.

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I.

HISTORIC BACKGROUND AND DEVELOPMENT

Commonwealth Oil Refining Company, Inc., ("CORCO") was incorporated in 1953 under the laws of the Commonwealth of Puerto Rico. CORCO began operating in 1956 as a petroleum refinery and eventually expanded its operations to include several petrochemical facilities. In essence, CORCO is in the business of producing and selling refined petroleum products and a variety of petrochemicals. The refinery and petrochemical facilities represent an investment of $545,000,000.00 and have a replacement cost of $1,000,000,000.00.

It should be noted that CORCO's corporate structure is multi-faceted and complex in that there are a total of twenty-two affiliates, subsidiaries and joint venture companies integrally tied to the parent company's operations. Eleven of these subsidiaries are involved in these Chapter XI proceedings. For a variety of business reasons, the parent, CORCO, is licensed to do business in Puerto Rico, New York and Texas, while the subsidiary companies are qualified or licensed in those states and countries which best serve their particular business purpose such as: Liberia, Puerto Rico, the Bahamas, Delaware and Virginia.

From the inception of the company until approximately 1971, all of CORCO's operations and management were situated in Puerto Rico. In 1971, the executive offices were moved to New York City, New York. In 1975, Tesoro Petroleum Corporation ("Tesoro") headquartered in San Antonio, Texas, acquired a 36.7% ownership interest in CORCO's common stock. Thereafter, in May, 1976, the executive offices and most management and executive personnel were moved from New York City to San Antonio where the CORCO offices are now located.

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II.

CORCO'S INTERNAL STRUCTURE

CORCO'S organizational structure is divided into two distinct aspects which may be generally classified as management and production. The distinction is particularly magnified by the geographic fact that management of

the company emanates from the CORCO offices on the mainland of the United States in San Antonio, Texas, whereas the actual plant facilities and production are centered on the island of Puerto Rico.

At its physical plant facility in Puerto Rico, CORCO directly employs over 1,400 people. There are between 15 and 20 employees at the CORCO office in McLean, Virginia, 2 employees in New York City and some 70 employees in San Antonio consisting of middle level management, top management and other executive personnel.

It is essential to examine in detail the various functions performed by management: The departmental relationship to one another; and management's relationship to its Puerto Rico facility and its customers.

Basically, CORCO management is divided into six (6) separate departments: Planning and Economics, Operations, Marine Transportation, Refined Products Marketing, Petrochemicals Marketing, and Environmental Affairs. Each of these departments are supervised by a Vice-President who in turn reports directly to the Executive Vice-President.

In addition to these six (6) major areas of responsibility, there are other departments which oversee CORCO's joint ventures, personnel, public affairs and an office which acts as liaison for suppliers and refined products. These departments are supervised by General Managers who also report to the Executive Vice-President. At the apex of the structural pyramid is the President and Chief Executive Officer. To assist the President in generally coordinating the company is the Executive Vice-President, the

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Vice-President and General Counsel, and the Vice-President, Comptroller and Treasurer. All of the officers of the company reside in San Antonio, Texas with the exception of the Senior Vice-President of Operations and the Vice-President of Refined Products Marketing who reside in Puerto Rico and McLean, Virginia respectively.

Crucial to the overall operation of CORCO is the General Manager of Raw Materials Supply Department and Refined Products Liaison. The department is essentially responsible for locating and purchasing all "feedstocks" for the operation of the refinery. The feedstocks purchased are primarily crude oil and naphtha. As there are no feedstock supplies in Puerto Rico, all negotiations and contracts for such purchases are conducted at or from the San Antonio office or elsewhere in the various oil centers of the United States such as Houston, New York and San Francisco. While the majority of crude oil feedstocks is purchased from United States producers, it is not uncommon for CORCO to acquire feedstocks from international sources such as Lybia and Venezuela.

Since prices in the oil industry fluctuate daily and purchases of feedstocks are made on a daily basis in accordance with customer demands, the Supply Department must maintain a day-to-day and even an hour-by-hour vigilence of the market to ascertain the best available supply of feedstocks for the best available supply of feedstocks for the best possible price. Parenthetically, it should be noted that CORCO is one of the largest naphtha purchasers in the world, and like crude oil purchases, the market for naphtha is world wide and subject

to similar variances of market fluctuation which requires constant scrutiny by the Supply Department.

The Marine Transportation Department, whose personnel are located in the CORCO San Antonio office, is charged with the daily shipping of feedstocks to the refinery as well as other petrochemical facilities in Puerto Rico. It is this Departmment's function to insure that delivery of feedstocks is

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timely and that the requisite ships are chartered, and that the charter hires are financially complete in every respect so that the transportation of the raw material to the refinery and from the refinery to the market place is economically and efficiently accomplished. The decisions of the Marine Transportation Department must be made on a daily basis and represent an integral part of CORCO'S operations.

The Petrochemical Marketing Department of CORCO is responsible for the sale and marketing of petrochemicals sold to the customers other than CORCO'S joint venturers. Negotiations for the sales of these products are conducted at or from the San Antonio office and/or the headquarter office of each customer. No such negotiations are conducted in Puerto Rico. While a great majority of CORCO'S petrochemical production is sold and under long term contracts, about 25% of sales are on a "spot purchase" basis to various customers in the United States, Europe, South America and Asia. Of the approximate $110,000,000.00 in petrochemical sales, 7.5 million dollars represented sales to Union Carbide for use in

Puerto Rico. Negotiations for the Union Carbide sales were conducted both in New York and San Antonio and not on the island of Puerto Rico. 1.5 million dollars represented sales to petrochemical customers in Puerto Rico.

The Refined Product Marketing Department and its Vice-President are located in McLean, Virginia. This department is responsible for the direct and daily control of CORCO'S sales activity for all refined fuel products marketed on the island of Puerto Rico. The Virginia office also operates as the CORCO Affiliate Petroleum Marketing Corporation which is charged with the supervision of all cargo, rack, and barge sales of petroleum products on the East Coast of the United States. CORCO'S major customer for its refined products is the Puerto Rican Water Resources Authority ("PRWRA") which furnishes the island its total supply of electrical power. The General Manager of

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Marketing lives in Puerto Rico and has the primary task of servicing the PRWRA account as regards collections, delivery dates, disputes involving demurrages, unpaid invoices, and reconciliation of figures and receipts of data concerning PRWRA fuel oil inventory. He has no authority to make commitments for the sale of fuel oil to PRWRA on behalf of CORCO. Rather, the General Manager of Marketing acts as a liaison between the customer, PRWRA, and the Vice President of Refined Product Marketing as concerns any supply or fuel oil inventory requirements. Any requests for a deviation in the refined product sold to PRWRA is transmitted from

the customer via the General Manager to his departmental Vice-President. The Vice-President, must, in turn, report any major deviation or need for additional fuel oil by PRWRA to the San Antonio office where the ultimate decision is made and re-transmitted back through the same channels to the customer.

As concerns the sale of refined products other than fuel oil—such as liquified petroleum gas, Jet A-1 aviation fuel, and gasoline, the sales responsibility is also vested in the Refined Products Marketing Department in Virginia. Contracts, sales agreements and negotiations for these products are all the responsibility of this department upon the ultimate approval of the San Antonio office. Such contracts and agreements concerning the sale of these refined products require the constant attention of the Vice-President who must be in regular communication with his corporate superior for ratification of new agreements or deviations from existing contracts.

The Operations Department is charged with the daily implementation of corporate policy as well as the control and direction of the daily operation of CORCO'S refining facilities in Puerto Rico. This department and its General Manager are located in San Antonio. Operations and its Manager are directly responsible for any and all variations in the refinery function which may result from changes in market, supply, price or oper-

ating mode. These variables must be dealt with on a day-to-day basis as problems arise and coordinated with the pertinent department heads to determine the appropriate

course of action. In essence, the Operations Department Manager is chairman of the Operating Team which will be discussed hereafter and responsible for coordinating, and implementing the Operating Plan.

The Planning and Economics Department is situated in San Antonio and one of its primary functions is the formulation of the basis of the Operating Plan. This department receives its input from all other departments and from the refinery and petrochemical facilities. The information gathered from all of these sources concerns among other things the availability of feedstock supplies; fuel price variations; the demands of the refinery and its customers; any equipment maintenance scheduling and transportation requirements. All of these and other pertinent factors are fed into a computer which is programmed to analyze the data and to produce a composite of information in mathematical terms of the overall status of the company, and a forecast of its various needs over a certain time frame. Obviously, the task is a complex and intricate one, and serves as a necessary guide in the formulation of the overall Operating Plan. As problems are encountered or changes made in the refinery production, contracts, supply or transportation, the computer run must be amended accordingly and the information re-evaluated. This function of the department is a daily one and comprises an essential element in the management of the company. Other responsibilities of the Planning and Economics Department are the development of short and long term plans for the operation of the company with particular emphasis on the conduct of operations at the refinery and petrochemical complexes; providing advice to management on the economic consequences of various business opportunities and options

as they arise; administering compliance with Department of Energy Regulations;

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and dealing with the Department of Energy as concerns the entitlements program.

Within the corporate structure of CORCO, it is also important to note the position of the Comptroller and Treasurer. While this office performs the usual fiscal functions generally associated with its title (i.e. maintenance of bank accounts, payment of taxes, preparation of financial reports) it is also charged with the payment of virtually every expenditure of the company except those related to actual local operations in Puerto Rico. These payments include among others the purchase of feedstocks and total expenditures amounting to approximately $20,000,000.00 per week. The department also supervises the investment of surplus funds on a short term basis which has earned about $100,000.00 to $150,000.00 per month. Cash disbursements, expeditures and investments of this magnitude require the daily attention of the Treasurer and his entire staff. Additionally, this department has been required to work closely with the various bank creditors, the fiscal agent and be accessible to the Court during these Chapter XI proceedings.

The Executive Vice-President of CORCO is directly involved in the day-to-day supervision of the supply and purchase of raw materials; the transportation of refined products; and the manufacturing and sale of refined and petrochemical products. He is not simply a

formulator of general company policy, but is rather an integral and essential supervisor of all department functions and, other than the President, is responsible for the ultimate decisions in the daily operational structure of CORCO.

There is one CORCO Vice-President who is responsible for the refinery operation in Ponce, Puerto Rico. Like other department heads, he is under the supervision of the Executive Vice-President in San Antonio, Texas. The refinery Vice-President essentially serves as a Plant Manager to supervise personnel, make incidental purchases, and insure that the refinery is run according to the Operating Plan which is formulated and directed from San Antonio. He has no authority to negotiate purchases

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of feedstocks; to negotiate sales of refined products; to stop or start refinery production except in emergencies; or to decide the volume of production.

Finally and most important is a description of the CORCO Operating Team. The Team is composed of the various department heads or their designated representatives. It is incumbent on the Team to evaluate all of the relevant information from as many department sources as possible to devise what has previously been termed as the Operating Plan. The Team meets once or twice a week and is chaired by the General Manager of Operations. Specifically, members of the team include personnel from Planning and Economics, Marine Transportation, Raw Materials and Supply, Refined Products Marketing and Operations as well as other de-

partments whenever their specific expertise and advice is desired. The Team reviews in detail the computer analysis and forecast prepared by Planning and Economics. Projections are made in light of the computer analysis and on the basis of information supplied by each department as to an overall Plan of Operation for the succeeding sixty-ninety days. Customer demand, availability of supply, transportation requirements, pricing and cost are among the factors taken into account in formulating the plan. As has been stated previously, many factors are presented almost daily which demand some degree of amendment to the Operating Plan. For that reason, the Plan is re-evaluated and re-structured on a weekly basis as often as necessary. This constant short term revision of the Operating Plan also affects the long range projections which must also be amended accordingly. The Plan is disseminated to all departments and plant facilities so that at every level of operation the company's goals, both immediate and in the future, are known by those charged with the task of its implementation. The Plan is far and above a mere statement of general policy or company guidelines. Rather, it represents the overall production schedule in detail and affects each and every aspect of the company's daily, weekly and monthly operations. There is no substantial deviation from the Plan by any department

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without clearance from the Operating Team in San Antonio. In essence, it is the Operating Team and the Plan which they devised that guides, governs, and affects every phase of CORCO's operations.

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III.

CORCO SUPPLIERS AND CUSTOMERS

While CORCO'S physical plant facilities are situated in Puerto Rico, it must be noted that the island produces no raw materials or feedstocks which may be locally purchased. As a result, the company is required to buy its crude oil and raw petrochemicals not only from the United States mainland but from worldwide markets.

As concerns crude oil purchases, CORCO'S major supplier is Coastal States Trading Company based in Houston, Texas. Libyan and Venezuelan crude oil is also purchased in significant quantities. Negotiations for feedstock purchases are generally conducted either by telephone contact with the supplier from the CORCO General Manager of Raw Materials and Supply in San Antonio or by personal contact with suppliers or their representatives in New York, Houston and San Francisco. Purchases of raw materials for use in the petrochemical plants are primarily negotiated and consummated with suppliers in the Southeast area of the United States.

The sale of CORCO petrochemical products is conducted by the Department of Marketing in San Antonio. Sales to customers, other than CORCO joint venture affiliates, in 1977 totalled some $110,000,000.00. Of that amount, approximately $9,000,000.00 represents sales in Puerto Rico. CORCO'S major petrochemical customers are located principally throughout the United States, Delaware, Missouri, Louisiana, New Jersey, West Virginia, as well as Germany, South America and Asia.

Negotiations for these sales are conducted either at the purchasers home office or from San Antonio.

Sales of refined products produced by CORCO and sold on the island of Puerto Rico was the responsibility of the Refined Product Marketing Department in McLean, Virginia. CORCO customers on the island include the major oil companies that

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purchase gasoline and aviation fuel (Texaco, Esso, Shell, Arco and Gasolinas de Puerto Rico), liquified petroleum gas customers, bunker sale customers, PRWRA and miscellaneous spot sales customers. PRWRA is undoubtedly the largest single customer of CORCO. In 1977, for example, sales to PRWRA generated approximately $182,000,000.00. Other gasoline sales on the island, during the same period account for some $198,000,000.00 or 9.9 Million barrels. Contracts for these sales are negotiated in the various home offices of these customers. PRWRA sales are conducted between the Authority executives and the CORCO liaison officer on the island with the approval of the Marketing Vice-President in McLean, Virginia and the Operating Team in San Antonio. Texaco contracts are negotiated in White Plains, New York. Shell sales are conducted in Puerto Rico. Arco contracts are consummated from Los Angeles, California. Gasolinas de Puerto Rico has its parent company in California where the contract was originally negotiated. Esso sales are conducted in Coral Gables, Florida.

Off-island spot sales of gasoline are made to customers principally in the Northeast United States and Eastern

seaboard from Norfolk, Virginia to Boston, Massachusetts. Those sales are made from the McLean, Virginia office upon the approval of the CORCO Operating personnel in San Antonio. In 1977 some 12.7 million barrels were sold at a dollar value of $190,000,000.00. The spot market includes sales of gasoline, kerosene and tool oil.

IV.

CORCO REVENUES AND DEBT STRUCTURE

The present financial picture of CORCO with particular attention to its existing debt structure is an essential aspect in the determination of proper venue. Initially and as was previously noted in this opinion, CORCO'S investment in its physical Puerto Rican plant facilities is in the neighborhood of

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$545,000,000.00 with a replacement cost of approximately $1,000,000,000.00. Tesoro Petroleum Company's purchase of 36.7% of CORCO common stock (5.5 million shares) represents an investment in CORCO of $80,000,000.00. As of the date of filing of these proceedings the additional indebtedness to Tesoro was in the $70,000,000.00 range. Primary lenders to CORCO comprise several of the largest banking houses in New York, California and Puerto Rico and are referred to as the Citibank Group. The debt owed to the bank group is presently in the neighborhood of $150,000,000.00.

The total shares of CORCO common stock outstanding is 14,999,831. Of that total, 243,441 shares (1.62%) are held by Puerto Rican residents numering 1,099

shareholders out of a total of 23,241 shareholders. Additionally, CORCO has issued $17,856,000.00 of 4½% convertible subordinated debentures due in 1992. These debentures are held by 783 accounts and Puerto residents hold 2.6% of the total outstanding debentures.

According to the schedules filed by CORCO in this case, there is a total indebtedness to all creditors in the amount of $322,881,857.88. From that total indebtedness there are landlord debts of about $606,000.00 of which 55% is owed to United States mainland creditors and 45% to Puerto Rican creditors. The debt scheduled as owing to taxing authorities is some $1,768,000.00 of which 11% is owed to United States mainland taxing authorities and 89% to Puerto Rico authorities. Priority wage claims total $400.69, 100% of which is owed to Puerto Rican employees. The secured debt totals $263,366,705.48 of which 91% is owed to United States mainland creditors and 9% to Puerto Rican creditors. The unsecured debt amounts to $57,140,364.98, of which 93% is scheduled as owing to United States mainland creditors and 7% to Puerto Rican creditors. In summary, the total indebtedness from all categories indicates that 90% of all debts are owed to United States mainland creditors and 10% to Puerto Rican creditors.

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Aside from the value of its physical plant facilities, and revenues generated therefrom, CORCO relies heavily upon the entitlements and exceptions programs administered by the Department of Energy of the United States. At the risk of oversimplification, the entitlements program is a monetary contribution by the Department of

Energy to certain companies in order to equalize competitive factors where it has been determined that inequities exist in the market place. The inaccessibility of the CORCO refinery to a material source of feedstock, the lack of a pipeline facility from the supplier to the refiner, the expense of shipping refined products to the mainland are some of the factors weighed in awarding CORCO the entitlements it receives. The company has been awarded entitlements amounting to $90,000,000.00-$100,000,000.00 a year from the Department of Energy. Obviously, these entitlements are a significant factor in the financial operation of the company.

V.

THE COMMONWEALTH OF PUERTO RICO

Having thus far set out the historic background and corporate and financial structure of CORCO as it exists internally and with respect to its customers, suppliers and creditors, it is also incumbent to consider the impact this proceeding has on The Commonwealth and people of Puerto Rico, and the factual basis for its position urging the transfer of the case to the Bankruptcy Court in San Juan.

In a strictly factual context, it must first be noted that all of CORCO's physical plant facilities—both refining and petrochemical—are located on the island of Puerto Rico. As has been noted, CORCO directly employs approximately 1,200 Puerto Rican residents. Through its own plant operations as well as its participation in the various joint venture projects in Puerto Rico, CORCO ultimately effects 12,000 Puerto Rican citizens. CORCO'S Puerto Rican payroll is $750,000.00.

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CORCO'S largest single customer is the Puerto Rican Water Resources Authority which consists of four power generating installations and provides all of the electrical power on the island. Electrical service customers number approximately 900,000 including commercial, industrial and residential. Forty percent of the total power generated by PRWRA emanates from its South Coast Plant which is dependent exclusively on CORCO for its fuel oil supply. Revenues from PRWRA to CORCO range from $132,000,000.00 to $182,000,000.00 per year.

In addition to furnishing PRWRA much of its fuel oil supply, CORCO provides other refined petroleum products and petrochemicals to island consumers. For example, CORCO supplies Puerto Rico with 98% of its liquified petroleum gas requirements, 62% of its motor gasoline, 90% of its aviation fuel, 58% of its middle distillates, and 73% of its aromatics.

CORCO is a fact of life for many of the people and businesses of Puerto Rico who depend on the company for jobs, transportation, fuels and electrical power. In turn, CORCO'S revenues are in large meature attributable to its sale of refined products and petrochemicals on the island. The immense public interest of the citizenry of Puerto Rico and their government are well founded and fully appreciated by this Court.

VI.

POST CHAPTER XI PROCEEDINGS

On March 2, 1978, CORCO filed for Chapter XI in

the San Antonio Division of the Western District of Texas. Since the date of filing, this Court has appointed a Fiscal Agent to oversee the company's operation generally and assist all parties in the formulation of a Plan of Arrangement. The Court has also approved the retention of various attorneys and law firms both in the United States and Puerto Rico to handle the myriad of legal problems facing the company during the pendency of the case.

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Prior to the First Meeting of Creditors, the Court was required to hear various emergency matters concerning the rejection of certain executory contracts, temporary restraining orders, designation of bank depositories and the like. Since the filing of the instant Motion for Transfer of this matter to Puerto Rico, the Court has refrained from ruling on substantive issues pending in the case until the venue question was heard and resolved.

On May 15, 1978, the First Meeting of Creditors was held for the limited purpose of receiving the report of the Fiscal Agent. Thereafter, the meeting was adjourned and the Motion now before the Court was thereafter presented in its entirety.

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VII.

LAW APPLIED TO THE FACTS

Jurisdiction is conceded to be in the Western District of Texas. Proper venue for these Chapter XI proceedings

is determined by Bankruptcy Rule of Procedure 116 (a)(2) which provides:

> (2) CORPORATION OR PARTNERSHIP. A petition by or against a corporation or partnership may be filed in the district (A) where the bankrupt has had its principal place of business or its principal assets for the preceding 6 months or for a longer portion thereof than in any other district; or, (B) if there is no such district, in any district where the bankrupt has property.

The Motions to Transfer Venue are brought under Bankruptcy Rule 116(b)(1) and (2) which provide:

> (1) WHEN VENUE PROPER. Although a petition is filed in accordance with subdivision (a) of this rule, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, in the interest of justice and for the convenience of the parties, transfer the case to any other district. The transfer may be ordered at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion.
>
> (2) WHEN VENUE IMPROPER. If a petition is filed in a wrong district, the court may, after hearing on notice to the petitioner or petitioners and such other persons as it may direct, dismiss the case or, in the interest of justice and for the convenience of the parties, retain the case or transfer it to any other district. Such an order may be made at or before the first meeting of creditors either on the court's own initiative or on motion of a party in interest but thereafter only on a timely motion. Notwithstanding the foregoing, the court may without a hearing retain a case filed in a wrong district if no objection is raised.

CORCO's principal place of business under Bankruptcy Rule 116(a) is a question of fact to be determined on a case by case basis and lies totally within the sound discretion of this Court. *Continental Coal Corp. v. Rozelle Brothers,* 242 F. 243 (6th Cir. 1917); *Chicago Bank of Commerce v. Carter,* 61 F.2d 968 (8th Cir. 1932); *In re R. H. Pennington & Co.,* 228 F. 388 (W.D. Kentucky 1915); *Clark Brothers Co. v. Portex Oil Co.,* 113 F.2d 45 (9th Cir. 1940); *In re Hudik-Ross Co., Inc.,* 198 F. Supp. 695 (S.D.N.Y.) *aff'd sub. nom.; In re S.O.S. Sheet Metal Co., Inc.,* 297 F.2d 32 (2d Cir. 1961); *In re Bankers Trust,* 403 F.2d 16 (7th Cir. 1968); *Dryden v. Ranger Refining & Pipeline Co.,* 280 F. 157 (5th Cir.); cert. denied 260 U.S. 726 (1922).

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This Court, after thoroughly reviewing the evidence adduced concerning where the debtors' principal place of business is located concludes that their principal place of business is San Antonio, Texas, and therefore the Western District is a proper venue situs for the debtors' Chapter XI proceeding as provided for under Bankruptcy Rule 116(a)(2). Movants rely on and cite *Dryden v. Ranger Refining & Pipe Line Co.,* 280 F. 257 (5th Cir. 1922) and *Anniston Soil Pipe Co. v. Central Foundry Co.,* 216 F.Supp. (N.D. Alabama, 1963); Aff'd per curiam, 329 F.2d 313 (5th Cir. 1964), as authority for their position that the debtors' principal place of business is situated in Puerto Rico. In the *Dryden* case, the Court concluded from the evidence that the bankrupt's principal place of business was in Ranger, Texas where its refinery was located. The *Dryden* case is easily

distinguished from the case at bar for the following reasons:

(1) In the *Dryden* case substantially all of the bankrupt's feedstocks were supplied from oil and gas wells owned by it in Texas which were situated in the general area of its refinery. In the case at bar, no feedstocks exist in Puerto Rico, but have to be imported by the debtor from the United States mainland and from certain foreign countries.

(2) In *Dryden* substantially all contracts for the sale of the bankrupt's refinery products were initiated and closed in Ranger, Texas, where its refinery was located. In the instant case substantially all of the debtors' contracts for purchase and sale of its feedstocks and refined products are controlled, negotiated, contracted for and closed from either their offices in San Antonio, Texas, McLean, Virginia, or from the customer's and purchaser's offices in the United States.

(3) In *Dryden* contracts for and agreements with various transportation companies for the inflow and

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outflow of its feedstocks and refined products were handled at the refinery office of the bankrupt in Ranger, Texas. In the case at bar, all contracts for and arrangements with Marine Transportation Companies are handled and controlled from the debtors' San Antonio office and not in Puerto Rico.

(4) In *Dryden* the great majority of the bankrupt's dealings with the public were carried on and closed

at its refinery office in Ranger, Texas. In the instant case, the great majority of the debtors' dealings with the public are directed, controlled, carried on and closed from either their San Antonio offices or from the offices of the various members of the public located in the United States.

Finally, the Court of Appeals in *Dryden* at pages 263 and 264, concedes that the place where a corporation's sales are negotiated, contracted, concluded and from which general supervision of all of its business is exercised, may be properly held to be the principal place of business of such corporation—as opposed to the place where the working operations of the corporation are located.

The *Anniston Soil Pipe Co.*, case is also distinguishable for the following reasons:

(1) No bankruptcy proceeding or venue issue was present in the *Anniston* case.

(2) In the *Anniston* case, the sole issue to be determined was whether the District Court had jurisdiction of the case based upon diversity of citizenship of the parties. In the case at bar, the jurisdiction of this Court over these Chapter XI proceedings is not an issue in the case.

(3) Movants have not shown that the factors and rationale used in *Anniston* or any other diversity case,

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bearing on a jurisdictional question, are applicable

to a determination of venue in a bankruptcy proceeding where jurisdiction itself is not an issue.

(4) In *Anniston,* the jurisdiction of the District Court failed because the principal place of business of the Appellant was found to be located in the same State as its Operating Plant, and as a result, no diversity of citizenship existed to support jurisdiction. In the instant case, the venue of this Court will not necessarily fail if the evidence had shown that the principal place of business of the debtors was in Puerto Rico, because Bankruptcy Rule 116(b)(2) expressly allows this Court to retain venue of the case—if the interest of justice and the convenience of the parties so requires.

The Court, having concluded and determined that proper venue for CORCO'S Chapter XI proceedings lie in the Western District under Rule 116(a)(2), must now determine whether venue for these Chapter XI proceeding should be transferred to the District of Puerto Rico under the discretionary provisions of Rule 116(b)(1). In determining such transfer issue, this Court should not freely abandon to another district, or lightly shift to another Court, its duty to determine a matter clearly within its jurisdiction and same should be exercised with caution. *In re United Button Co.,* 137 F. 668, 672 (D. Del. 1904), *In re Bankers Trust,* 403 F.2d 1623 (C.A. 7 1968). *In re Miller,* 172 F.Supp. 208, 209-210 (D. Kan. 1959). Also the burden of proof is upon the moving party requesting and seeking the transfer—with the quantum of the burden being a "fair preponderance of the evidence". *In re Triton Chemical Corp.,* 46 F.Supp. 326, 328 (D. Del. 1942); *In re Fairfield Puerto Rico, Inc.,* 333 F.Supp. 1187 (D. Del. 1971); *In re S.O.S.*

Sheetmetal Co., Inc., 297 F.2d 32 (2nd Cir. 1961); *In re Fada Radio & Electric Co.,* 132 F.Supp. 89 (S.D. N.Y. (1955).

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While Rule 116(b)(1) uses the term "convenience of the parties" in connetion with a discretionary transfer of venue in a bankruptcy proceeding, it does not attempt to define who are the parties at interest. It has been held however, that the term includes creditors, whether secured or unsecured, the debtor, shareholders, debenture holders, and all persons whose pecuniary interests are directly affected by the bankruptcy proceeding. *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45, 48; *Re United Button Co.* 137 F. 672; *Re Statewide Treatres Corp.,* 4 F.Supp. 87; *Haas v. Gerstel,* 134 F.2d 803, (C.A. 5 Fla. 1943); *In re Fairfield Puerto Rico, Inc.,* Supra, *In re Okmulge Producing & Refining Co.,* 265 F. 736 (D. Del. 1920). Accordingly it is held that CORCO, its affiliated companies, its creditors, both secured and unsecured, its debenture holders and shareholders are among those who are parties in interest.

The tests for transfer under Rule 116(b)(1) is whether it is "in the interest of justice and for the convenience of the parties" to transfer the case to another district. Neither the Bankruptcy Act nor the Bankruptcy Rules of Procedure attempt to define the phrase "in the interest of justice" or "convenience of the parties". However, it has been held and recognized by the Courts that some of the factors to be considered in determining whether a transfer of venue will be "in the interest of justice" and "for the convenience of the parties" are:

(1) The proximity of creditors of every kind to the Court;

(2) The proximity of the bankrupt (debtor) to the Court;

(3) The proximity of the witnesses necessary to the administration of the estate;

(4) The location of the assets;

(5) The economic administration of the estate;

(6) The necessity for ancillary administration if bankruptcy should result.

See *In The Matter Of Fairfield Puerto Rico, Inc.*, debtor 33 F.Supp. 1187 (D. Del. 1971); *In re United Button Co.*, 137 F.

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668, (D. Del. 1904); *Haas v. Gerstel,* 134 F.2d 803, (C.A. 5 Fla. 1943); *In re Triton Chemical Corp.*, 46 F.Supp. 326, (D. Del. 1942); *In re Bankers Trust,* 403 F.2d 16, (C.A. 7 1968); *In re Miller,* 172 F.Supp. 208, (D.C. Kan. 1959).

The foregoing factors are applied as follows in the instant case:

The Economic And Efficient
Administration Of The Estate Of
The Debtor-In-Possession

If one factor could be singled out as having the most logical importance, it would be whether a transfer would promote the efficient and economic administration of an

estate. *In re United Button Co.*, 137 F. 668; *In re Triton Chem. Corp.*, 46 F.Supp. 326, 329. The evidence clearly shows that the estates of the Debtors-In-Possession are being jointly administered in the Western District in an economic and efficient manner. Reference is here made to the voluminous findings set forth by the Court in Parts I & II of this Opinion which bear upon and relate to this important factor. Such findings clearly show that the debtors' management operations are substantially based and geared to their San Antonio, Texas office from which the economic and efficient operations of the estates of these Debtors-In-Possession are currently being accomplished and will continue to be accomplished in the future. Additionally, no evidence was adduced to show that the Debtors-In-Possession have any other office in Puerto Rico or elsewhere which can readily duplicate the management functions of the San Antonio office. Also, Movants, in support of their Motion to Transfer Venue, adduced no meaningful evidence to show how or under what circumstances the estates of the Debtors-In-Possession could be administered as economical and efficiently, or more economical and efficiently in Puerto Rico than is currently being accomplished in San Antonio. Rather, the evidence tended to show that in all probability, the expenses of administering the debtors' Chapter XI proceedings would increase if venue is transferred to

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Puerto Rico, and the remoteness of the proceedings in Puerto Rico from the debtors' total management operations in San Antonio, and the United States mainland, would reduce the efficient administration of these Chapter XI proceedings.

Proximity Of The Creditors To The Court

In considering the interest of the creditors in determining whether venue should be transferred in this case, it is the total dollar amount of the claims held by creditors, and not their number, which is more important. *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45, 48. In the instant case, the evidence established 90% of the debtors' total indebtedness is owed to United States mainland creditors and only 10% to Puerto Rican creditors. Additionally, only 1.62% of the debtors' shareholders are residents of Puerto Rico, and only 2.6% of its debenture holders are Puerto Rican residents. By comparison, 36.7% of the debtors' common stock is owned by a San Antonio based shareholder having an investment of approximately $80,000,000.00 in same. Also, the same San Antonio based shareholder has advanced loans to CORCO totaling approximately $70,000,000.00.

It has been held that the creditors with the largest claims have the greatest interest and their interests should be weighed accordingly. *Re Republic Gas Corp.,* 6 F. Supp. 70, 71; *Re United Button Co.,* 137 F. 673; *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45. In the case at bar, a substantial number of the creditors having the largest claims have requested the Court to retain venue in the Western District. Among these large creditors desiring venue to be retained in San Antonio are a majority of the debtors' lender-banks who are currently providing post-Chapter XI financing for the debtors' continued operations. Finally, Tesoro Petroleum Company, the owner of 36.7% of the debtors' common stock, and the owner and holder of a $70,000,000.00 indebtedness, has also expressed a preference for venue in the Western District.

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Proximity To The Court And Choice Of Forum Of The Debtors-In-Possession

Due to the extensive operations of the Debtors-In-Possession, numerous hearings have been held and will continue to be held during the course of these Chapter XI proceedings, which require the attendance in Court as witnesses, of a substantial number of the debtors' middle level and top level management—based in San Antonio. Most of these hearings are substantive in nature, involving large sums of money, and involve subject matter which is vital to the continued business operations of the debtors and their goal of rehabilitation. These hearings must be conducted in a timely and expeditious manner if the interests of the debtor and other parties at interest are to be fully protected. No counterparts of debtors' middle and top level management personnel are situated in Puerto Rico. Additionally, all of such witnesses and their interpolated work data, are located in San Antonio. Further, the Attorneys-In-Chief, who represent the debtors in these Chapter XI proceedings, have their offices in Houston, Texas and Dallas, Texas, which are in close proximity to the Court. Finally, the debtors' chief supplier of crude oil, with whom CORCO must negotiate and confer on an almost daily basis, and whose sales to CORCO amount to $2,500,000.00 to $3,000,000,00 a day, is situated in Houston, Texas and is in close proximity to the Court.

Location Of Books, Records And Assets

Substantially all of the books and records of debtors are maintained in Puerto Rico. By computer systems sit-

uated both in San Antonio and Peurto Rico, the management of CORCO at San Antonio has instant access to such books and records, and can actually "override" the computer systems in Puerto Rico in order to make changes in such books and records or in order to "update"

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same. Additionally, the principal assets of the debtor, which consist of its plant facilities, are located in Ponce, Puerto Rico—with management and operations of such plant facilities being principally situated and conducted from San Antonio. As previously stated, the tests for transfer under Rule 116(b)(1) is whether "the interest of justice" and "the convenience of the parties" will best be served by such transfer. However, it is clear from Rule 116(b)(1) that the location of the principal assets does not necessarily control whether transfer should be ordered. Determinative factors will vary with each case. *In re Fairfield Puerto Rico, Inc.*, 333 F.Supp. 1187 (D. Del. 1971).

The Necessity For Ancillary Administration If Bankruptcy Results

This Court is not unmindful of the necessity for ancillary administration in the event a subsequent adjudication of the debtors as bankrupts occur in this proceeding. However, anticipation of the failure of these Chapter XI proceedings is not a valid or logical basis upon which to base or predicate a transfer of venue in this case. Again, determinative factors vary with each case. *In re Fairfield Puerto Rico, Inc.*, 333 F.Supp. 1187, (D. Del. 1971).

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VIII

CONCLUSION

There are several matters which have not received specific treatment in this opinion but which were raised either in briefs or during the hearing which require comment by the Court.

Substantial testimony was elicited by the Commonwealth of Puerto Rico and PRWRA regarding CORCO'S inability to provide sufficient supplies of fuel oil reserves to meet emergency situations that may arise especially during the hurricane season. The evidence showed that all of PRWRA'S fuel oil consumption requirements have been met on a regular basis, and that a reserve inventories fell into short supply only when the refinery refused to furnish fuel because of a dispute over payment. In any event, witnesses for CORCO reiterated their

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assurances that PRWRA's requirements would be met in all respects now and in the future.

Additionally, testimony was adduced at the hearing from witnesses on behalf of the Puerto Rican Government concerning the devastating effect a refinery shut down would have on the island generally. This Court is completely aware of the absolute necessity of CORCO's continued operation at full capacity, and during the pendency of this case will keep a constant vigil to prevent any cessation of operation in order to preserve and protect the national and economic interests of the people of Puerto Rico.

Considering and weighing all of the above set forth factors and being aware that the formulation of a Plan of Arrangement depends primarily on efforts and activities of a financial nature which are, for the most part, conducted from San Antonio or from other parts of the United States mainland, the Court concludes that the Movants have failed to carry their burden of proof by a fair preponderance of the evidence in support of transferring venue to Puerto Rico. The Motions, therefore, will be denied but with leave granted to The Commonwealth of Puerto Rico and Puerto Rico Water Resources Authority to renew their Motion in the event there is an adjudication under the Bankruptcy Act.

Entered this 26th day of May 1978 at San Antonio, Texas.

JOSEPH C. ELLIOTT
Joseph C. Elliott
Bankruptcy Judge

* * *

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-730

COMMONWEALTH OF PUERTO RICO AND PUERTO RICO WATER RESOURCES AUTHORITY,
Petitioners

v.

COMMONWEALTH OIL REFINING COMPANY, INC., ET AL.,
Respondents

Brief In Opposition To The Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

ROBERT C. MALEY, JR.
SHEINFELD, MALEY & KAY
2130 Two Shell Plaza
Houston, Texas 77002
(713) 224-3640

Counsel for Respondents

Of Counsel:

ROCHELLE, KING & BALZERSEN
1435 Republic National Bank Bldg.
Dallas, Texas 75201
(214) 742-4171

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Rule 810	5

TEXTS

1 J. Moore, *Federal Practice* ¶ 0.77[3.-4], at 717.80 (2d ed. 1978)	12
13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3625 (1975)	6, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-730

COMMONWEALTH OF PUERTO RICO AND PUERTO RICO WATER RESOURCES AUTHORITY,
Petitioners

v.

COMMONWEALTH OIL REFINING COMPANY, INC., ET AL.,
Respondents

Brief In Opposition To The Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

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Respondents, Commonwealth Oil Refining Company, Inc., and various of its affiliates and subsidiaries (hereinafter jointly referred to as "Corco"), file this Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. Pursuant to U. S. Sup. Ct. Rule 40(3), Corco accepts petitioners' statements of the opinions below, jurisdiction and the relevant statutory provisions.

QUESTIONS PRESENTED

1. Was the bankruptcy court, pursuant to the venue provisions of Bankruptcy Rule 116(a)(2), clearly erroneous in finding Corco's principal place of business to be San Antonio, Texas, where these Chapter XI arrangement proceedings were filed?
2. Did the bankruptcy court abuse its discretion in declining to transfer these proceedings to Puerto Rico?

STATEMENT OF THE CASE

On March 2 and 3, 1978, Corco commenced these proceedings by filing original petitions under Chapter XI of the Bankruptcy Act in the San Antonio Division of the Western District of Texas, San Antonio being the location of Corco's principal place of business. By these Chapter XI business arrangement proceedings, Corco seeks to rehabilitate itself financially in the bankruptcy court while continuing, with minimal disruption, its day-to-day operations.

Petitioners filed an objection to venue and moved to transfer these proceedings to the United States District Court for the District of Puerto Rico. Following a four-day evidentiary hearing, the bankruptcy court entered extensive findings of fact that Corco's principal place of business is in San Antonio, and that venue of these proceedings thus is proper. The bankruptcy court, following a full and written discussion of the relevant factors, further declined to transfer these proceedings to Puerto Rico as urged by petitioners pursuant to Bankruptcy Rule 116(b)(1).

Petitioners thereupon appealed to the district court which, although disagreeing with the bankruptcy court's factual determination of Corco's principal place of business, affirmed the bankruptcy court's denial of petitioners' motion to transfer to Puerto Rico. Petitioners then appealed to the United States Court of Appeals for the Fifth Circuit which unanimously affirmed the bankruptcy court's fact judgment that Corco's principal place of business is in San Antonio and the two lower courts' discretionary determination that these proceedings properly are retained in San Antonio. The Fifth Circuit denied petitioners' motion for rehearing en banc. Petitioners now seek issuance of a writ of certiorari to review the judgment and opinion of the Fifth Circuit.

REASONS FOR DENYING THE WRIT

1. THE CENTRAL QUESTION OF CORCO'S PRINCIPAL PLACE OF BUSINESS IS A QUESTION OF FACT, PROPERLY DECIDED BY THE BANKRUPTCY COURT TO BE SAN ANTONIO, THAT DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER THE CLEARLY ERRONEOUS STANDARD.

Bankruptcy Rule 116(a)(2), promulgated to be effective in 1974, sets forth the general rule for corporations that venue in Chapter XI arrangement proceedings is proper in a district in which the debtor has *either* its principal assets *or* its principal place of business.[1]

1. Bankruptcy Rule 116, adopted by this Court in 1974 and made applicable to Chapter XI proceedings by Chapter XI, Rule 11-13, now establishes the guidelines for proper venue in these proceedings. By virtue of 28 U.S.C. § 2075, Rule 116 supersedes Sec-

Corco's principal assets are in Puerto Rico. The venue question raised by petitioners in the bankruptcy court, and which petitioners are asking this Court to review, is whether Corco's principal place of business is in San Antonio, where Corco's corporate headquarters are located and these proceedings filed, or in Puerto Rico. This is not the type of question that warrants this Court's special attention.

As noted by the Fifth Circuit below, consistent with other courts of appeal, the location of a corporation's principal place of business is a question of fact. *See, e.g., Guarantee Acceptance Corp. v. Fidelity Mortgage Investors,* 544 F.2d 449, 452 (10th Cir. 1976); *Riggs v. Island Creek Coal Co.,* 542 F.2d 339, 342 (6th Cir. 1976); *Shahmoon Indust., Inc. v. Imperato,* 338 F.2d 449, 451 (3rd Cir. 1964). Following a four-day hearing devoted to the question of Corco's principal place of business, the bankruptcy court entered an extensive opinion detailing Corco's organizational and management structure, its revenue and debt structure, the location of personnel, assets and facilities, and all other aspects of its corporate operations. The bankruptcy court found on the basis of the evidence adduced at the hearing and numerous and detailed subsidiary findings of fact that Corco's executive and management offices are located in San Antonio, that its overall business and financial operations, both external and internal, are managed and controlled from its San Antonio headquarters, and that

tion 2a(1) of the Bankruptcy Act which governed venue determinations prior to 1974. Section 1472 of the new Bankruptcy Code, which governs venue in proceedings filed on or after October 1, 1979, perpetuates the dual tests of "principal place of business" and situs of "principal assets" as available venue alternatives.

Corco's principal place of business is in San Antonio.[2] The bankruptcy court's opinion, appended to petitioners' application as Appendix "E", offers a full review of the facts. The opinion of the Fifth Circuit, appended to petitioners' application as Appendix "C", also details the bankruptcy court's findings.

As correctly noted by the Fifth Circuit, a bankruptcy court's principal place of business determination is reviewable on appeal under the strict "clearly erroneous" standard. 596 F.2d at 1247; *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, supra* at 452; *Clark Bros. Co. v. Portex Oil Co.,* 113 F.2d 45, 47 (9th Cir. 1940); *see* Bankr. Rules 752, 810, Rules of Bankruptcy Procedure. Petitioners have been afforded appellate review of the bankruptcy court's fact determination under this "clearly erroneous" test in two appellate courts. The Fifth Circuit has upheld the bankruptcy court's fact conclusion as not only *not* clearly erroneous, but also as correct.[3]

2. Petitioners flatly state in their Statement of the Case at page 5 that "Corco conducts no business in San Antonio." Such a statement is ludicrous in light of the evidence presented to the bankruptcy court and documented in the court's detailed findings of fact. Petitioners continue to rely and expand upon the income tax-related statement of Mr. Frank H. Wetzel, Corco's senior financial officer, who, at the outset of questioning by counsel for petitioners as to how Corco classifies its corporate operations for federal income tax purposes, i.e., domestic or foreign, acknowledged that Corco, excluding its wholly owned affiliates, is not engaged in business in San Antonio. (Tr. 321). One need merely read the entire federal income tax discussion by Mr. Wetzel to understand the tax-related intent of his statement, and the bankruptcy court's doubts as to the relevance of such technical income tax classifications. (Tr. 321-331).

3. Petitioners in footnote 3 of their Petition erroneously attribute to the Fifth Circuit in quoted form a recitation of those facts that tie Corco to Puerto Rico. This recitation was not made by the Fifth Circuit. Rather, the quoted language is the language of the district court in support of its judgment that Puerto Rico and not San Antonio should be deemed Corco's principal place of business. (Pe-

There is no reason why this Court need allow petitioners a third appellate forum to argue the correctness of the bankruptcy court's finding under the "clearly erroneous" standard. The facts at issue relating to Corco's corporate structure and operations are unique and peculiar to Corco, and important only to the parties to these proceedings. A review by this Court would involve nothing more than application of the familiar "clearly erroneous" standard to these particular facts and recognition of the axiom well established in the circuit and district courts that principal place of business determinations depend on the facts of each case. *See generally* 13 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3625, at 802 (1975) (hereinafter "WRIGHT"). The question of a particular corporation's principal place of business simply is not certiorari material within the guidelines of U.S. Sup. Ct. Rule 19.

2. THE BANKRUPTCY COURT'S DISCRETIONARY DECISION DECLINING TO TRANSFER THESE PROCEEDINGS TO PUERTO RICO HAS BEEN AFFIRMED BY TWO APPELLATE COURTS AND DOES NOT REQUIRE FURTHER APPELLATE REVIEW BY THIS COURT UNDER AN ABUSE OF DISCRETION STANDARD.

The Court should be even less inclined to consider whether the bankruptcy court abused its discretion in declining to transfer these proceedings to Puerto Rico, as was urged by petitioners pursuant to Bankruptcy Rule 116(b)(1). Both appellate courts below, applying the "abuse of discretion" standard, have affirmed the bankruptcy court's decision to retain these proceedings in San Antonio. Even the district court, while deciding Corco's principal place of business and principal assets both to be in Puerto Rico, determined that the interest of justice and convenience of the parties warranted retention of these proceedings in San Antonio.

In sum, Rule 116(b) vests in the bankruptcy court discretion (1) to transfer proceedings to *any* district, even if venue is proper where filed; or (2) to retain the proceedings, even if venue is not proper where filed. This complete geographic discretion accorded the bankruptcy court, without regard to where venue is technically proper under subsection (a) of Rule 116, is governed by the dual criteria of the interest of justice and the convenience of the parties.

The bankruptcy court enunciated and discussed six factors in shaping its decision: (1) the proximity of creditors of every kind to the court; (2) the proximity of the debtor to the court; (3) the proximity of the witnesses necessary to the administration of the estate; (4) the location of books, records and assets; (5) the economic administration of the estate; and (6) the necessity for ancillary administration if a "straight" bankruptcy should result. (Petitioners' Appendix "E", at 25-32). The bankruptcy court also expressly considered the interests of petitioners. Both the district court and the Fifth Circuit wholly approved and affirmed the bankruptcy court's discussion of the relevant factors, and its denial of peti-

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tioners' Appendix "D", at 4 n.1). The Fifth Circuit in the course of its analysis of the district court's approach merely quoted the district court's discussion. It is important that this Court appreciate that the Fifth Circuit, while acknowledging the district court's principal place of business finding by quoting the district court's short recitation of key facts, specifically rejected the district court's analysis and reversed the district court's conclusion.

tioners' motion to transfer. Indeed, the Fifth Circuit stepped from behind the available "abuse of discretion" shield and concluded its opinion by cogently noting why in its opinion the interests of all parties, including petitioners, are best served by Corco being able to maintain these proceedings in San Antonio where it chose to file them:

> "The government [of Puerto Rico] contends that the overwhelming concern of Puerto Rico with the continued operations of CORCO require a transfer of this case to Puerto Rico. We disagree. Without belittling in the least the extent of Puerto Rico's interest in CORCO, that interest is served by maintaining CORCO as a functioning refinery. This can best be accomplished in San Antonio. The troubles of CORCO are financial. The people who can solve these problems for CORCO are in San Antonio. The bankruptcy court found . . . that it will be less disruptive to the continued operation of CORCO if this case is retained in San Antonio." 596 F.2d at 1248.

The bankruptcy court's decision under Bankruptcy Rule 116(b) was a proper use of its broad discretion. Both the district court and Fifth Circuit have affirmed the bankruptcy court. There is no need for this Court as a third appellate court to expend its valuable time to review again under the "abuse of discretion" standard the bankruptcy court's exercise of discretion not to transfer Corco's Chapter XI proceedings to Puerto Rico. None of the special purposes for which the writ of certiorari is designed, as set forth in U. S. Sup. Ct. Rule 19, would be advanced by such review.

3. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF OTHER COURTS.

Petitioners allege that the Fifth Circuit's opinion affirming the bankruptcy court's finding that San Antonio is the site of Corco's principal place of business is in conflict with other federal court decisions, including earlier decisions in the Fifth Circuit. Simply stated, there is not a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals", *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), or between the Fifth Circuit and this Court on the issues raised in this appeal. *See* U.S. Sup. Ct. Rule 19(1)(b).

Petitioners attempt to create a "conflict" between the Fifth Circuit decision and certain circuit and district court opinions cited at pages 12 and 13 of the Petition by pointing out that these decisions determined a particular corporation's principal place of business to be the location where its principal assets were concentrated and its physical operations conducted. Any such "conflict" is not legal; it is factual. As noted previously, it is axiomatic that the results in these decisions, and indeed in all opinions that have considered the fact issue of a corporation's principal place of business under any statute or rule, turned on the particular facts of each corporation's structure and operation, and the significance that the court determined should be attributed to each factor on the basis of the corporation's overall existence. One can pick out special facts in each decision cited by petitioners that explain and justify the particular result reached. There simply exists no real conflict among the circuits

on the principal place of business question, including the Fifth Circuit, and especially is there no conflict in the bankruptcy context under Bankruptcy Rule 116.

Petitioners, however, further attempt to create a "conflict" by focusing on the Fifth Circuit's cogent discussion of the significance of the expanded venue alternatives made available by Bankruptcy Rule 116 for Chapter XI proceedings and the diminished vitality of decisions prior to 1974 that construed the prior venue statute. The Fifth Circuit recognized the obvious. Prior to 1974, venue in Chapter XI proceedings was limited under Section 2a(1) of the Bankruptcy Act, 11 U.S.C.A. § 11(a)(1), to the corporation's principal place of business. Courts necessarily focused on the location of assets as a significant factor under this test. By this Court's adoption of Bankruptcy Rule 116 in 1974, venue in Chapter XI proceedings was expanded to include either the corporation's principal place of business *or* the place of its principal assets. The Fifth Circuit correctly and logically noted that because the situs of a corporation's principal assets is now set out as a separate and distinct test for proper venue, emphasis on the location of these same assets is no longer appropriate in the principal place of business determination. 596 F.2d at 1244-45. Although relevant to the principal place of business, the situs of principal assets should not control both of the venue alternatives. *See In re Portex Oil Co.*, 30 F. Supp. 138, 140 (D. Ore. 1939), *aff'd sub. nom., Clark Bros. v. Portex Oil Co.*, 113 F.2d 45 (9th Cir. 1940) (applying the analogous venue provision in Chapter X proceedings).

The Fifth Circuit thereupon proceeded to "clean house" in this Circuit and to note that the freshness of its de-

cisions under the more limited and earlier venue statute has been soured by Rule 116's expansion of venue alternatives to include the situs of principal assets as a separate basis for venue, apart from the corporation's principal place of business. Decisions prior to the adoption of Rule 116 properly are distinguisnable on this basis. To the extent petitioners rely upon such pre-Rule 116 decisions as support for a claimed "conflict", those decisions are temporally distinguishable and out-of-date.

The Fifth Circuit's discussion is consistent with the more liberal and expanded venue provisions of Rule 116 and is not in conflict with any case decisions under Rule 116, of which there are only a handful. Indeed, the only circuit decision cited by petitioners as being in conflict is the Tenth Circuit Court of Appeals' application of the analogous Chapter X venue provisions in *Guarantee Acceptance Corp. v. Fidelity Mortgage Investors, supra.* The facts of Guarantee Acceptance Corporation's corporate existence are significantly at odds with Corco's structure and operations. The Tenth Circuit's determination that Guarantee's principal place of business and principal assets both are in California is without doubt correct. However, petitioners attempt to create a conflict on the basis of the Tenth Circuit's correct statement that a corporation's headquarters and offices are not necessarily its principal place of business and that all factors must be considered in making the determination. 544 F.2d at 452. Petitioners do not identify the conflict created by the Tenth Circuit's observations. The Fifth Circuit, by affirming the bankruptcy court's finding on the basis of an extensive record that Corco's principal place of business is in San Antonio at the site of its management offices,

obviously has not declared that the location of a corporation's headquarters necessarily is its principal place of business, as petitioners indirectly suggest.

Finally, petitioners seek issuance of a writ of certiorari on the basis of the Fifth Circuit's recognition in footnote 17 of its decision that the "principal place of business" test for corporate citizenship under 28 U.S.C. § 1332(c) was added in 1958 in order to *restrict* diversity jurisdiction while still affording protection to nonresident litigants, whereas the adoption of Bankruptcy Rule 116 *expands* venue choices for corporations filing Chapter XI arrangement proceedings. The Fifth Circuit briefly noted that these contrasting policy concerns of restrictive federal court jurisdiction versus expansive corporate venue in Chapter XI proceedings should be kept in mind in assessing the relevance of earlier decisions to a particular principal place of business determination. The Fifth Circuit's footnote observation is consistent with other authorities that also have recognized the need to respect this difference in policy concerns. *See generally* 13 WRIGHT, *supra* § 3625, at 788 and n.3; 1 J. Moore, FEDERAL PRACTICE ¶ 0.77[3.-4], at 717.80 (2d ed. 1978), and cases cited therein.

Unlike numerous petitions for certiorari that raise substantial and difficult questions as to whether a conflict exists warranting the grant of certiorari, such is not the case here. There is no real, substantive conflict in legal principles as to a corporation's principal place of business under Bankruptcy Rule 116(a). Petitioner has not established a conflict or other basis for the grant of certiorari within the contours of U.S. Sup. Ct. Rule 19 and this Court's opinion in *Layne & Bowler Corp. v. Western Well Works, Inc., supra.*

CONCLUSION

The two questions raised by this venue appeal are: (1) whether the bankruptcy court's ultimate finding of fact that Corco's principal place of business is in San Antonio is "clearly erroneous" and (2) whether the bankruptcy court's discretionary determination to retain these Chapter XI arrangement proceedings in San Antonio constitutes an "abuse of discretion". The bankruptcy court's decision that these proceedings are proper in San Antonio has been affirmed by both the district court and the Fifth Circuit. No difficult or substantial legal questions are presented, nor does any conflict in legal principle exist between the Fifth Circuit decision and decisions of other circuit courts or of this Court. Thus, there are no "special and important" reasons for the granting of certiorari, as required by U.S. Sup. Ct. Rule 19.

For these reasons, petitioners' application for a writ of certiorari should be denied.

Respectfully submitted,

COMMONWEALTH OIL REFINING COMPANY, INC., ET AL.

By: (ORIGINAL SIGNED) ROBERT C. MALEY, JR.
ROBERT C. MALEY, JR.

Of Counsel:

SHEINFELD, MALEY & KAY
2130 Two Shell Plaza
Houston, Texas 77002
(713) 224-3640

ROCHELLE, KING & BALZERSEN
1435 Republic National Bank Bldg.
Dallas, Texas 75201
(214) 742-4171

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on each of the following parties by placing the same, postage prepaid, certified mail, return receipt requested, in the United States Mail, on this the _____ day of December, 1979:

Kenneth R. Wynne, Esq.
Bracewell & Patterson
2900 South Tower Pennzoil Place
Houston, Texas 77002

Benjamin Rodriguez Ramon
Housing Investment Building
Suite 840, P. O. Box "SS"
Hato Rey, Puerto Rico 00919

George J. Wade, Esq.
Shearman & Sterling
53 Wall Street
New York, New York 10005

James G. Ulmer, Esq.
Baker & Botts
One Shell Plaza
Houston, Texas 77002

Burleson Smith, Esq.
Cox, Smith, Smith, Hale & Guenther, Inc.
500 National Bank of Commerce Building
San Antonio, Texas 78205

Howard C. Buschman, III, Esq.
Wilkie, Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10027

Patrick H. Swearingen, Jr., Esq.
Matthews, Nowlin, McFarlane & Barrett
1500 Alamo National Bank Building
San Antonio, Texas 78205

John Tower White, Esq.
Wender, Murase & White
400 Park Avenue
New York, New York 10022

Bond Davis, Esq.
Gresham, Davis, Gregory, Worthy & Moore
1800 Frost Bank Tower
San Antonio, Texas 78205

L. E. Dubon, Esq.
Dubon, Gonzalez & Berrios
Banco de Ponce Building
15th Floor
GPO Box 6123
San Juan, Puerto Rico 00936

Cicente Zayas Puig, Esq.
Baragano, Arzuaga & Zayas
P. O. Box 4191-S
San Juan, Puerto Rico 00936

Francis & Doval
GPO Box CH
San Juan, Puerto Rico 00936

Escribano, Carreras, Aceuedo, Perez
& Varela
212 Mayaguez Street
Suite 3-B
Hato Rey, Puerto Rico 00917

E. Delgado Roque
GPO Box 5028
San Juan, Puerto Rico 00936

Anthony V. Ponzio, Esq.
United States Securities & Exchange
Commission
219 South Dearborn Street
Chicago, Illinois 60604

James T. Eichstaedt, Esq.
Chief Counsel
Division of Corporate Regulations
Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Michael Paige, Esq.
Assistant General Counsel
U. S. Department of Energy
Washington, D. C. 20461

Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, D. C. 20530

Robert A. Baker, Fiscal Agent
Commonwealth Oil Refining Co., Inc.
8626 Tesoro Drive
San Antonio, Texas 78217

Joe Warren Jones, Esq.
615 National Bank of Commerce Building
San Antonio, Texas 78205

Jack Hebdon, Esq.
Groce, Locke & Hebdon
2000 Frost Tower
San Antonio, Texas 78205

(ORIGINAL SIGNED) ROBERT C. MALEY, JR.

ROBERT C. MALEY, JR.

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JAN 9 1980
MICHAEL RODAK, JR., CLERK

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INC., ET AL.,
Respondents

PETITIONERS' REPLY MEMORANDUM

KENNETH R. WYNNE
2900 South Tower Pennzoil Place
Houston, Texas 77002

BENJAMIN RODRIGUEZ RAMON
Housing Investment Building
Suite 840
Post Office Box "SS"
Hato Rey, Puerto Rico 00919

Counsel for Petitioners

January 8, 1980

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

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Supreme Court of the United States

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PETITIONERS' REPLY MEMORANDUM

Respondent, Commonwealth Oil Refining Company, Inc., et al., ("Corco") in its Brief in Opposition in No. 79-730, sets forth three purported "Reasons for Denying the Writ," the first two of which are newly raised in that Brief and therefore qualify for reply pursuant to Supreme Court Rule 24.

Succinctly stated those two reasons are (1) that the "clearly erroneous" standard of appellate review makes

reversal unlikely as to the finding that Corco's principal place of business is in San Antonio, Texas and (2) that the "abuse of discretion" standard of review also makes unprobable a transfer of these proceedings to Purto Rico. Both present irrelevant procedural issues, neither bears legitimately on the decision of whether or not to grant certiorari, and Respondent's dependence upon them, rather than addressing the substance of the Petition, underscores the need to reach the substantive errors of the Court of Appeals.

REPLY POINT 1

THE CLEARLY ERRONEOUS STANDARD OF REVIEW IS APPLICABLE ONLY TO FINDINGS OF FACT, AND THE PETITION FOR CERTIORARI RAISES NO FACT ISSUES.

Petitioners urge that certiorari be granted in part because the Fifth Circuit Court of Appeals has misperceived the fundamental objectives of Chapter XI of the Bankruptcy Act and has misdefined and misapplied the rubric of "principal place of business." Further, the Court of Appeals has committed those errors in a case which is unusually important because of the breadth and variety of interests it directly affects as well as the precedential impact it will have under the new Bankruptcy Code. Petitioners have not asked this Court to second, third or fourth-guess the facts. Petitioners do strenuously seek a review of the definition of "principal place of business" and the assumptions about the objectives of the Bankruptcy Act indulged by the Fifth Circuit Court of Appeals in its treatment of the facts. The importance of granting certiorari lies not in a review of who within the Corco

organization does what, or where it is done, but rather, given essentially clear facts, what is the meaning and the purpose of the statutory context into which those facts fit. The Petition raises issues of law, issues of statutory interpretation, issues of Congressional intent, issues such as whether there should be one definition of "principal place of business" for bankruptcy venue and a second definition for diversity jurisdiction. None of these issues is reviewable by the purely fact-oriented "clearly erroneous" standard.

Respondent's effort to characterize the Petition for Certiorari as raising the "clearly erroneous" standard misses the mark entirely. The meat of the opinion of the Court of Appeals, and the part which most needs correction, is entitled "III. Venue in Chapter XI Proceedings." It is there that the Court sets forth its legal conclusions. It is there that the Court concedes the Fifth Circuit has been "inconsistent in its treatment of this issue" of "principal place of business"; it is there that the Court disregards as "irrelevant" all decisional authority as to "principal place of business" in the context of diversity jurisdiction; it is there that the Court concludes Rule 116 tacitly altered the statutory meaning of "principal place of business"; and it is there that the Court assumes the Bankruptcy Act should serve only the convenience of a debtor, to the total disregard of the interests of those with whom the debtor has chosen to do business in a place apart from the home of some of its executives. The "clearly erroneous" standard, applicable to findings of fact, has no bearing upon the Fifth Circuit Court's conclusions of law and constitutes no reason to deny the requested Writ of Certiorari.

REPLY POINT 2

THE "ABUSE OF DISCRETION" STANDARD OF REVIEW IS IRRELEVANT IN RULING ON THE PETITION FOR CERTIORARI.

This Court will not be called upon to decide whether any lower court has abused its discretion if certiorari is granted. Respondent's reliance on a contrary premise is misplaced.

Certainly, discretion has been exercised; yet, whether it has been abused is not in issue for two reasons. First, pursuant to Bankruptcy Rule 116, the parameters of permissible discretion in deciding the ultimate venue of a Chapter XI proceeding are fixed by a preliminary determination of whether venue is proper where the proceedings were begun. In this case that first, pivotal finding depends upon where the debtor has its principal place of business. It is that initial fundamental decision which creates the most compelling reasons for this Court's review, not the subsequent election to retain the proceedings where venue has been incorrectly deemed to be proper. Second, Rule 116 permits different degrees of discretion to change venue, depending upon whether the initial venue, in light of the debtor's principal place of business is proper. If the initial venue is found to be proper where it is, Rule 116 presumes that is where it should stay. The Court, accordingly, has only limited discretion to transfer it elsewhere.

Conversely, if the debtor's principal place of business is other than where the proceedings were begun, venue is improper and presumptively should be changed, subject only to a narrowly circumscribed discretion *to retain. In Re Bankers' Trust,* 403 F.2d 16, 23 (7th Cir. 1968)

("[D]iscretion to *retain* jurisdiction 'should be exercised with great caution and in few cases'. . . ." [emphasis supplied]).

There is no question here of whether discretion has been abused. To the extent discretion is involved here at all, it is subjugated to far more pressing issues which Petitioners have asked this Court to review. If discretion is to be addressed, the question is not whether it was abused, but only whether its scope has been properly perceived and followed.

CONCLUSION

Neither of the procedural appellate review arguments Respondent has made is pertinent in weighing the reasons why certiorari should be granted. The compelling need for High Court correction of the precedent set by the Court of Appeals remains essentially unanswered and substantially unchallenged. This is an important case, involving important, enduring issues, fully deserving of this Court's attention and decision.

Respectfully submitted,

KENNETH R. WYNNE
2900 South Tower Pennzoil Place
Houston, Texas 77002
(713) 223-2900

BENJAMIN RODRIGUEZ RAMON
Housing Investment Building
Suite 840
Post Office Box "SS"
Hato Rey, Puerto Rico 00919

Counsel for Petitioners

January 8, 1980

CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing have been served on each of the following parties by placing same, postage prepaid, certified mail, return receipt requested, in the United States Mail, on this the 8th day of January, 1980:

Sheinfeld, Maley & Kay
2130 Two Shell Plaza
Houston, Texas 77002

Rochelle, King & Balzersen
1435 Republic National Bank Building
Dallas, Texas 75201

George J. Wade
Shearman & Sterling
One Citicorp Center
153 E. 53rd Street
New York, New York 10022

James G. Ulmer, Esq.
Baker & Botts
3000 One Shell Plaza
Houston, Texas 77002

Burleson Smith, Esq.
Cox & Smith, Incorporated
600 National Bank of Commerce Building
San Antonio, Texas 78205

Howard C. Bushman, III, Esq.
Willkie, Farr & Gallagher
One Citicorp Center
153 East 53rd Street
New York, New York 10027

Patrick H. Swearingen, Jr., Esq.
Matthews, Nowlin, McFarlane & Barrett
1500 Alamo National Bank Building
San Antonio, Texas 78205

John Tower White, Esq.
Wender, Murase & White
400 Park Avenue
New York, New York 10022

Bond Davis, Esq.
Gresham, Davis, Gregory, Worthy & Moore
1800 Frost Bank Tower
San Antonio, Texas 78205

L. E. Dubon, Esq.
Dubon, Gonzalez & Berrios
Banco de Ponce Building, 15th Floor
G.P.O. Box 6123
San Juan, Puerto Rico 00936

Vincente Zayas Puig, Esq.
Baragano, Arzuaga & Zayas
P. O. Box 4191-S
San Juan, Puerto Rico 00905

Francis & Doval
G.P.O. Box CH
San Juan, Puerto Rico 00936

Escribano, Carreras, Aceuedo
Perez & Varela
212 Mayaguez Street, Suite 3-B
Hato Rey, Puerto Rico 00917

E. Delgado Roque
G.P.O. Box 5028
San Juan, Puerto Rico 00136

Anthony V. Ponzio, Esq.
United States Securities and Exchange
Commission
219 S. Dearborn Street
Chicago, Illinois 60604

James T. Eichstaedt, Esq.
Chief Counsel
Div. of Corporate Regulations
Securities and Exchange Commission
500 N. Capitol Street
Washington, D.C. 20549

Michael Paige, Esq.
Assistant General Counsel
U. S. Department of Energy
Washington, D.C. 20461

Barbara Allen Babcock
Assistant Attorney General
Civil Division
Department of Justice
Washington, D.C. 20530

Robert Baker
c/o Commonwealth Oil Refining
Company, Inc.
8626 Tesoro Drive
San Antonio, Texas 78217

Jack Hebdon, Esq.
Groce, Locke & Hebdon
2000 Frost Tower
San Antonio, Texas 78205

Joe Warren Jones, Esq.
615 National Bank of Commerce Building
San Antonio, Texas 78205

Solicitor General
Department of Justice
Washington, D.C. 20530

KENNETH R. WYNNE